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1943

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1942

No. 591

■

THE WEST VIRGINIA STATE BOARD OF EDUCATION etc., et al.
Appellants

v.

WALTER BARNETTE, PAUL STULL and LUCY McCLURE
Appellees

■

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

APPELLEES' BRIEF

HAYDEN C. COVINGTON
Attorney for Appellees

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APPELLEES' BRIEF

Opinion Below

The opinion of the United States District Court is reported in 47 F. Supp. 251 and is printed in the record at pages 49 to 54.

Jurisdiction

Jurisdiction of this Court is invoked under Sections 266 and 345 of the Judicial Code [28 U. S. C. 345, 380] allowing direct appeals from a final decree rendered by a district

court granting an injunction and restraining enforcement of a state statute or regulation.

Timeliness

The final decree was entered on October 6, 1942 and the petition for appeal was presented and allowed on October 31, 1942 and within the three months required by statute.

The Statutes

The *statutes* and *regulations*, the validity of which is drawn in question, as construed and applied to appellees and their children, are, respectively:

Section 5, Article 2, Chapter 18 of the Code of West Virginia, 1931, reading in part as follows:

> "Sec. 5. *General Powers and Duties.* Subject to and in conformity with the Constitution and laws of this State, the state board of education shall determine the educational policies of the State, except as to the West Virginia University, and shall make rules for carrying into effect the laws and policies of the State relating to education, including rules relating to . . . the general powers and duties of county and district boards of education, and of [school trustees], teachers, principals, supervisors, and superintendents, and such other matters pertaining to the public schools in the State as may seem to the Board to be necessary and expedient."

Section 5-A, Article 8, Chapter 18 of the Code of West Virginia, 1931, as last amended on Compulsory School Attendance, reading as follows:

> "Sec. 5-A. If a child be dismissed, suspended or expelled from school because of refusal of such child to meet the legal and lawful requirements of the school and the established regulations of the county and/or

state board of education, further admission of the child to school shall be refused until such requirements and regulations be complied with. Any such child shall be treated as being unlawfully absent from school during the time he refuses to comply with such requirements and regulations and any person having legal or actual control of such child shall be liable to prosecution under the provisions of this article for the absence of such child from school."

Section 9, Article 2, Chapter 18 of the Code of West Virginia, 1931, as amended by Chapter 38 of the Acts of the Legislature of 1941, reading in part as follows:

"Sec. 9. In all public, private, parochial and denominational schools located within this state there shall be given regular courses of instruction in history of the United States, in civics, and in the constitutions of the United States and of the state of West Virginia, for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government of the United States and of the state of West Virginia. *The state board of education shall, with the advice of the state superintendent of schools, prescribe the course of study covering these subjects for the public elementary and grammar schools, public high schools and state normal schools. It shall be the duty of the officials or boards having authority over the respective private, parochial and denominational schools to prescribe courses of study for the schools under their control and supervision similar to those required for the public schools.*"

REGULATION promulgated by and adopted by the State Board of Education, appellants, herein, on January 9, 1942, requiring that all pupils participate in the flag-salute ceremony, reads as follows:

"WHEREAS, The West Virginia State Board of Education holds in highest regard those rights and privileges guaranteed by the Bill of Rights in the Constitution of the United States of America and in the Constitution of West Virginia, specifically, the first amendment to the Constitution of the United States as restated in the fourteenth amendment to the same document and in the guarantee of religious freedom in Article III of the Constitution of this State, and

"WHEREAS, The West Virginia State Board of Education honors the broad principle that one's convictions about the ultimate mystery of the universe and man's relation to it *is* [are] placed beyond the reach of law; that the propagation of belief is protected whether in church or chapel, mosque or synagogue, tabernacle or meeting house; that the Constitutions of the United States and of the State of West Virginia assure generous immunity to the individual from imposition of penalty for offending, in the course of his own religious activities, the religious views of others, be they a minority or those who are dominant in the government, but

"WHEREAS, The West Virginia State Board of Education recognizes that the manifold character of man's relations may bring his conception of religious duty into conflict with the secular interests of his fellowman; that conscientious scruples have not in the course of the long struggle for religious toleration relieved the individual from obedience to the general law not aimed at the promotion or restriction of the religious beliefs; that the mere possession of convictions which contradict the relevant concerns of political society does not relieve the citizen from the discharge of political responsibility, and

"WHEREAS, The West Virginia State Board of Education holds that national unity is the basis of

national security; that the flag of our Nation is the symbol of our National Unity transcending all internal differences, however large within the framework of the Constitutions; that the Flag is the symbol of the Nation's power; that emblem of freedom in its truest, best sense; that it signifies government resting on the consent of the governed, liberty regulated by law, protection of the weak against the strong, security against the exercise of arbitrary power, and absolute safety for free institutions against foreign aggression, and

"WHEREAS, The West Virginia State Board of Education maintains that the public schools, established by the legislature of the State of West Virginia under the authority of the Constitution of the State of West Virginia and supported by taxes imposed by legally constituted measures, are dealing with the formative period in the development in citizenship that the Flag is an allowable portion of the program of schools thus publicly supported.

"THEREFORE, be it RESOLVED, That the West Virginia State Board of Education does hereby recognize and order that the commonly accepted salute to the Flag of the United States—the right hand is placed upon the breast and the following pledge repeated in unison: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all'—now become a regular part of the program of activities in the public schools, supported in whole or in part by public funds, and that all teachers as defined by law in West Virginia and pupils in such schools shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an act of insubordination, and shall be dealt with accordingly."

Also involved here is the construction and application of THE LAW of Almighty God "whose name alone is JEHOVAH", to wit, the first of His ten commandments set forth in Holy Writ at the book of Exodus:

"I am JEHOVAH thy God, who brought thee out of the land of Egypt, out of the house of bondage.

"Thou shalt have no other gods before me.

"Thou shalt not make unto thee a graven image, nor any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth:

"Thou shalt not bow down thyself unto them, nor serve them; for I JEHOVAH thy God am a jealous God, visiting the iniquity of the fathers upon the children upon the third and upon the fourth generation of them that hate me.

"And showing lovingkindness unto thousands of them that love me and keep my commandments."

—Exodus 20: 2-6, *American Revised Version*

Statement

PROCEEDINGS

Appellees brought this action in the United States District Court at Charleston, West Virginia, to enjoin the enforcement of the foregoing state statutes and regulation of the said Board of Education *as applied to them*, claiming that the *application* of such laws *to them* abridged their rights contrary to the Federal Constitution. R. 11-13.

At the hearing on the application for interlocutory injunction, the parties stipulated to submit the cause for final hearing upon the complaint and motion to dismiss. (R. 49) The material facts alleged in the complaint were admitted true as pleaded.

The trial court rendered its judgment granting the injunction (R. 45-46) and filed an opinion holding the statutes and regulation invalid as construed and applied to appellees. R. 49-54.

FACTS

Appellees and persons for whom they sue are native and legal American citizens residing in almost every county of the State of West Virginia. They have minor children who are required by compulsory education law to attend the public schools within the district where each resides. Long prior to January 1942, and since January 1942, the appellant BOARD OF EDUCATION and its agencies, all public schools throughout the State of West Virginia, required and now require, by the regulation, performance of the above-described flag salute by all pupils in attendance at the public schools, at stated intervals of each week. No provision is made, by the regulation, for exemption of any pupil from the giving of said salute [1] or the reciting of such pledge, for conscience' sake. R. 8, 47.

While the flag-salute ceremony was being performed in

[1] Although the form of the salute is universally approved, it is to be noticed that it is very much like that of the Nazi regime in Germany.

each of the schools, the children of appellees and of other of Jehovah's witnesses stood in respectful silence and declined to participate in the ceremony. They and their parents attempted to have the flag-salute regulation changed so as to allow them to give the following pledge, to wit,

> I have pledged my unqualified allegiance and devotion to Jehovah, the Almighty God, and to His Kingdom, for which Jesus commands all Christians to pray.
>
> I respect the flag of the United States and acknowledge it as a symbol of freedom and justice to all.
>
> I pledge allegiance and obedience to all the laws of the United States that are consistent with God's law, as set forth in the Bible.

and to stand while others saluted the flag and gave the pledge prescribed by the Board of Education. (R. 4, 8, 14) This request of appellees was refused. (R. 8, 14) Upon failure of each pupil to participate in said flag-salute ceremony and give the prescribed salute to the flag of the United States in the manner required by the foregoing Regulation,[2] such children of each appellee and of other of Jehovah's witnesses were excluded, suspended and expelled from the public schools and denied the right to receive an education in any public school of the State of West Virginia. R. 8, 47.

The reason given that children of appellees and of other of Jehovah's witnesses refuse to participate in the foregoing flag-salute ceremony was and is that each is in a covenant with JEHOVAH, the Almighty God, to obey His will. Each of said children conscientiously believes that his failure to believe and obey the precepts and commandments of JEHOVAH laid down in the Bible[3] will result in his eternal destruction at the hand of Almighty God. R. 3, 4, 47, 18-29.

---

[2] The current regulation, the one here questioned, was promulgated under and by virtue of authority granted in the foregoing statute, particularly Chapter 38 of the Acts of the Legislature of West Virginia, 1941.

[3] Exodus 20: 2-6, page 6, supra.

Such children and appellees sincerely believe that the act of participating in the flag-salute ceremony or saluting any flag of any nation, including the United States flag, constitutes for such covenant-bound person a violation of the commandment of Almighty God recorded in the Bible book of Exodus, chapter 20, verses two to six, as set forth at page 6, this brief. R. 3-4, 17-43, 47.

Such children and their parents further believe that to participate in the flag-salute ceremony as promulgated by the Regulation aforesaid constitutes *for them* a religious ceremony and rite, and that to salute the flag means to ascribe salvation to the power for which the flag stands; that the flag and governmental power for which the flag stands are of the world and not of JEHOVAH GOD; and since JEHOVAH GOD alone can give salvation to any creature, the act of saluting the flag would thus, *to them*, be a hypocritical ascribing of salvation to the state. The children have been brought up to believe sincerely the above commandments of Almighty God, written in His Book, the Bible. R. 3-4, 17-43, 47.

Appellees, the persons for whom they sue, and their children, are loyal American citizens and obey all the laws of the land that do not conflict with the Supreme Law of Almighty God. R. 4, 14, 38-43.

They believe that their first and highest duty is to JEHOVAH GOD. (R. 2-4) The booklet *God and the State* published by Jehovah's witnesses is made a part of the record. (R. 13, 16-43) It is referred to here for further explanation of the Biblical reason for the action of Jehovah's witnesses and fully explains the position of appellees on the flag salute question. We incorporate the entire booklet herein and make it a part hereof by reference. (R. 16-43) From cover to cover it is filled with scriptural quotations showing that Exodus 20: 2-6 enjoins the true Christian who is one of Jehovah's witnesses from saluting the flag of any nation. This conclusion is not the interpretation of Jehovah's witnesses or of any man but appears to be the inter-

pretation of Jehovah God. Scriptural instances recorded showing the stand taken by Jehovah's witnesses in ancient times on the same issue here involved are given therein to show that God's Law is Supreme and that one in a covenant with Almighty God cannot willingly violate that covenant without suffering everlasting destruction. Historical origin of the compulsory flag-salute is there given, and the facts showing that the Nazis have pushed it to the fore as a means of regimenting the people in continental Europe. The flag salute is shown as an opportune means of false demonstration of patriotism by those who work against the welfare of the country. The booklet contains a summary of the *Gobitis* case from the time it originated in the United States District Court to the judgment of this Court on June 3, 1940. The booklet shows the true meaning of loyalty and establishes that Jehovah's witnesses are faithful and true citizens of this country and fighters for the righteous principles of democracy. The foregoing substitute pledge is offered. (Page 8, supra; R. 39) The booklet concludes with an explanation of the course that must be taken by Jehovah's witnesses on this question regardless of the action taken by the state or nation or agencies thereof. The booklet restates the stand taken by Jesus Christ's apostles as the official statement of Jehovah's witnesses: "We ought to obey God rather than men."—Acts 5: 29.

It is admitted that the refusal of the children of Jehovah's witnesses to participate in said ceremony and salute does not present a *clear and present danger* against proper and regular operation of any public school. It is conceded that there is no danger that other pupils will be thereby induced to become Jehovah's witnesses and join appellees' children in their stand of refusal to salute the flag, because of extreme unpopularity of Jehovah's witnesses. R. 13, 14, 47-49.

The number of children of Jehovah's witnesses in the public schools of West Virginia constituted a very small percentage of the entire school population. R. 9, 13-15.

There is nothing in the faith or practices of Jehovah's witnesses and their children in refusing to salute the flag that is contrary to public morals, health, safety or welfare of either the state or nation. R. 14, 51, 35-36, 39, 49.

Great numbers of children have been expelled from school and denied education in the public schools. Practically all of such expelled children and their parents are financially unable to provide for adequate private instruction. Such children and their parents have been threatened with immediate prosecution under penal statutes prohibiting truancy and delinquency and contributing to delinquency of minors. The sole basis of such threatened prosecution is the fact that said children are denied the right to a public education by reason of their exclusion from school because they refuse to participate in said flag-salute ceremony or to salute the flag as required by the Regulation. It is admitted that the children were otherwise model students and obedient pupils. R. 8, 49.

It was admitted that by reason of their children being deprived of the right to attend the public schools, and the above facts and circumstances, appellees were faced with the clear, present and immediate danger that they would suffer irreparable injury and loss by reason of the appellants' conduct unless the appellants were restrained as requested. R. 10, 49.

Appellees do not have an adequate and sufficient remedy at law in the state courts that is available to them to protect their rights. R. 10-16, 49.

Appellees on three occasions duly applied to the Supreme Court of Appeals of the State of West Virginia for a writ of prohibition against the appellants herein to have the statutes and regulations in question construed and applied and the validity of appellees' objections thereto passed upon and determined. The writ of prohibition is a permissive remedy under practice of West Virginia. In these applications a request was also made to have the court order appellees' children to be permitted to return to school and

give the substitute pledge above and otherwise be excused from the ceremony required by the Regulation. Said Supreme Court of Appeals three times declined to grant said appellees the relief requested. At the time this action was instituted and decided in the court below there was no clear and adequate remedy in the state courts which would afford appellees relief and which would dispose of the federal questions presented as speedily as the remedy here employed. R. 10, 14-16.

Federal Questions Presented

The Record

In the complaint, paragraphs 24 and 25, it is alleged that the foregoing statutes and regulations of the State of West Virginia unconstitutionally abridge rights of the appellees and other of Jehovah's witnesses and their children, contrary to the First and Fourteenth Amendments to the United States Constitution, in that the rights of freedom of speech, freedom of conscience, freedom to worship Almighty God, freedom of the children to attend the public schools, and freedom to direct the moral and spiritual education of the children were denied and abridged. (R. 10-11) The statutes and regulations of the State were held by the Court below to violate the *amendments* above mentioned. The *federal questions* here presented were decided in favor of appellees and the persons for whom they sue. R. 45-54.

Complaint States Cause of Action

Appellants argue that the complaint did not allege a cause of action because "no substantial federal question" was presented. The basis for this argument is that the claimed federal question was unsubstantial, frivolous, and wholly lacking in merit because the same questions had been previously disposed of by prior decision of this court in *Minersville* v. *Gobitis,* 310 U. S. 586. The general rule announced by this court and relied upon by appellants is correct where the prior decision is unanimous and settled but, as in the *Gobitis* case, where the issue remains unsettled the rule does not apply. Justice Brandeis, dissenting in the *Coronado Oil* case (285 U. S. 393, 405), said: "*stare decisis* is not, like the rule of *res judicata,* a universal, inexorable command". Chief Justice Taney stated that "it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." (*Smith* v. *Turner,* 7 How. 283, 470) In view of the unsettled state of the law at the time the complaint was filed, it must be concluded that a "substantial federal question" was presented in the complaint, *Lovering & Garrigues Co.* v. *Morrin,* 289 U. S. 103, 105; *Columbus Ry. Power & Light Co.* v. *Columbus,* 249 U. S. 399.

Points for Argument

ONE

The statutes and regulation in question, providing for compulsory flag-salute ceremony in public schools, when *construed and applied* to facts and circumstances of this case, abridge appellees' and their children's right of freedom of speech, freedom to worship ALMIGHTY GOD, freedom of conscience and freedom to direct the spiritual education and welfare of said children, contrary to the First and Fourteenth Amendments to the United States Constitution.

TWO

The statutes and regulation in question, providing for compulsory flag-salute ceremony in public schools, when *construed and applied* to facts and circumstances of this case, deny appellees' right to have their children attend the free public schools by requiring the doing of an act contrary to the *due process* and *equal protection* clauses of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

ONE

The statutes and regulation in question, providing for compulsory flag-salute ceremony in public schools, when *construed and applied* to facts and circumstances of this case, abridge appellees' and their children's right of freedom of speech, freedom to worship ALMIGHTY GOD, freedom of conscience and freedom to direct the spiritual education and welfare of said children, contrary to the First and Fourteenth Amendments to the United States Constitution.

A

ANCIENT HISTORY of salute to symbols of government and the practice of conscientious men to refuse participation in the ceremony and instead to worship ALMIGHTY GOD alone.

About 1500 B. C., after the Israelites' deliverance by JEHOVAH from bondage under the first world power, Egypt, and immediately following the God-given command recorded at Exodus 20: 2-6, Almighty God called their leader Moses apart into the mountain for conference. While Moses was away to Mount Sinai the Israelites constructed an image. It was a golden calf. They sacrificed to it and worshiped it in violation of the command of JEHOVAH. This unfaithfulness to their covenant obligation Almighty God quickly condemned.—Exodus 32: 1-8, 30-35.

In the days of the second world power of history, Assyria (*about* 700 B. C.), its king Sennacherib came down and laid siege against Jerusalem, the holy city appointed by Jehovah for His people Israel. The people appealed for counsel to Isaiah, one of Jehovah's witnesses. (Isaiah, chapter 37)

The besieging Assyrian forces had standards, concerning which *The International Bible Dictionary* says:

> "The Assyrian standards were emblematic of their religion, and were therefore the more valuable as instruments for leading and guiding men into the army. The forms were imitations of animals, emblems of deities, and symbols of power and wisdom. Many of them were crude, but others were highly artistic and of great cost."

It was therefore but natural that the Assyrian hosts treated those standards with reverence and struck religious attitudes toward them.

There is no Scriptural evidence that God's typical theocratic nation of Israel used such standards in their offensive operations against their heathen foes; and certainly God's covenant people Israel did not perform acts of obeisance or any "religious" practice toward such. (Cf. Psalm 20:5-8) Such would have been abhorrent to them, because they were in a covenant with Jehovah God, which covenant forbade them to worship creatures or man-made objects and authorized worship and adoration of Almighty God alone. The faithful Israelites heeded the words of Jehovah's prophet Moses, to wit:

> "Take ye therefore good heed unto yourselves; for ye saw *no manner of form* [similitude] on the day that JEHOVAH spake unto you in Horeb out of the midst of the fire; lest ye corrupt yourselves, and make you a graven image in the form [similitude] of any figure, the likeness of male or female, the likeness of any beast that is on the earth, the likeness of any winged bird that flieth in the heavens, the likeness of anything that creepeth on the ground, the likeness of any fish that is in the water under the earth; and lest thou lift up thine eyes unto heaven, and when thou seest the sun

and the moon and the stars, even all the host of heaven, thou be drawn away and worship them, and serve them."—Deuteronomy 4: 15-19, *American Revised Version.*

In the time of Daniel (*about* 600 B. C.) at the third world empire's capital, Babylon, Nimrod's city founded by that totalitarian ruler, there was constructed an image or symbol representing the political power or state. The government published a decree that all persons within the realm should salute the image. The *majority* looked upon the practice as proper, for they regarded it as holy because it represented their god, the State. Present at that ceremony were *three men* who refused to bow down or salute the image. They were Jehovah's witnesses, Shadrach, Meshach, and Abednego, who could not salute it because they were in a covenant to obey God rather than men, the State, and were obligated to keep the commandment expressed at Exodus 20: 3-6. For their "high treason" they were denied the right of freedom to worship Almighty God *alone* and were promptly thrown into a red-hot furnace. Because of their faithfulness and refusal to break their covenant with Almighty God, He delivered them unsinged, while the men who threw them into the furnace were consumed by the intense heat.—Daniel, chapter 3.

About 500 B. C., when the Medo-Persian empire dominated the whole world, in the reign of Xerxes (Ahasuerus) a decree went forth that all persons should salute the prime minister, Haman, by bowing down at a certain time. Mordecai, a faithful Jew in a covenant with Jehovah, refused to obey the order because contrary to the command of Almighty God recorded at Exodus 20: 3-6. His refusal brought upon him a judgment to hang by the neck until dead. His faithfulness and refusal to compromise under such pressure brought him deliverance at the hand of Almighty God. —Esther, chapters 3 to 6.

The Israelites' abhorrence to giving obeisance to stand-

ards and even to having the standards of the heathen present in the holy city of Jerusalem is instanced in the days of Pontius Pilate, the Roman procurator or resident governor of Judea who delivered over Jesus Christ to be nailed to the tree at Calvary. Concerning this the Jewish historian Josephus, in his *Antiquities*, Book xviii, 3, 12, and *Wars of the Jews*, ii, 9, 2-4, says in substance as follows:

"One of Pilate's first acts was to remove the headquarters of the army from Caesarea to Jerusalem. The soldiers of course took with them their standards, bearing the image of the emperor, into the Holy City. Pilate had been obliged to send them in by night, and there were no bounds to the rage of the people on discovering what had thus been done. They poured down in crowds to Caesarea, where the procurator was then residing, and besought him to remove the images. After five days of discussion he gave the signal to some concealed soldiers to surround the petitioners and put them to death unless they ceased to trouble him; but this only strengthened their determination, and they declared themselves ready rather to submit to death than forego their resistance to an idolatrous innovation. Pilate then yielded, and the standards were by his orders brought down to Caesarea. No previous governor had ventured on such an outrage. Herod the Great, it is true, had placed the Roman eagle on one of his new buildings; but this had been followed by a violent outbreak, and the attempt had not been repeated. The extent to which the scruples of the Jews on this point were respected by the Roman governors is shown by the fact that no effigy of either god or emperor is found on the money coined by them in Judea before the war under Nero. Assuming this, the denarius with Caesar's image and superscription of Matt. xxii must have been a coin from the Roman mint, or that of some other province."—McClintock and Strong's *Cyclopedia*, Vol. VIII, p. 200.

Christ Jesus when on earth was propositioned to worship the state, render obeisance to the Roman government and

thus escape punishment and persecution. The Devil promised Jesus honor and rulership over *all the kingdoms of the world* if He would bow down and worship him, the Devil, as god of all kingdoms of the earth. The sacred Record of this outstanding example of unbending *exclusive* devotion to Almighty God reads as follows:

> "Again, the devil taketh him up into an exceeding high mountain, and sheweth him all the kingdoms of the world, and the glory of them; and saith unto him, All these things will I give thee, if thou wilt fall down and worship me. Then saith Jesus unto him, Get thee hence, Satan: for it is written, Thou shalt worship the Lord [JEHOVAH] thy God, and him *only* shalt thou serve."—Matthew 4:8-10; cf. Deuteronomy 6:13; Isaiah 8:13.

Throughout the centuries after Christ Jesus there have ever been faithful men who, like Jesus, firmly maintained and refused to surrender, regardless of cost, the right of freedom to worship Almighty God *exclusively* as commanded by JEHOVAH, and declined to submit their conscience to the dictates of the state.

"In the time of the Roman empire, it was customary for the people to burn a pinch of incense before a statue of the emperor. The early Christians, while recognizing the sovereignty of the emperor, refused to perform this ceremony, deeming it idolatrous." (Quoted from Opinion of Supreme Court of the State of Washington, delivered January 29, 1943, in *Bolling* v. *Superior Court for Clallam County*, etc., unanimously declaring unconstitutional the application to Jehovah's witnesses of the compulsory flag-salute statute.)

A less ancient instance of refusal to salute an image or symbol of the state is that of William Tell, one of the movers against the strangling encroachments of the Holy Roman Empire upon peoples of the Alpine provinces. He,

with others, helped to set the cornerstone of the Swiss Confederation in that mountain stronghold. Concerning Tell it is recorded that he boldly refused to salute the hat of Gessler, resident representative of the Austrian tyrant king then leagued with the world-dominant leader of the ecclesiastical hierarchy at the Vatican. The bailiff's hat was placed on a pole in a public place at Altdorf and every person coming to market was required by law to show allegiance to the state by saluting the hat. Because of his refusal, Tell was commanded to shoot an apple from his son's head with an arrow. See *Encyclopedia Britannica*, Vol. 26, pp. 574-576; *Encyclopedia Americana*, Vol. 26 (1942 ed.), pp. 400-401; Roy Elston, *The Traveller's Handbook to Switzerland* (London, Eng., 1929-1930), pp. 21-42, 142.

In more modern times, perhaps the most apposite example is the assertion by the Quakers in England during the seventeenth century of a conscientious scruple against uncovering the head in deference to any civil authority. The Quakers sincerely believed that uncovering the head was an act of worship, and were unable to bring themselves to take off their hats even under circumstances where the general *custom* of the kingdom demanded the gesture. This scruple, however fantastic it may have appeared to the vast majority, was, nevertheless, exercised honestly by a few God-fearing persons. In a standard contemporary work their reason and purpose in doing this is stated, as follows:

> "He that kneeleth, or prostrates himself to man, what doth he more to God? He that boweth, and uncovereth his head to the *creature*, what hath he reserved to the *Creator?* Now the apostle shows us, that the *uncovering of the head* is that which God requires of us in our worshiping of him, 1 Cor. xi. 14."—Barclay, *Apology for the True Christian Divinity*, Proposition xv, Sect. 6 (1676). [Cf. Acts 10:25, 26; Revelation 22:8, 9]

For observing this scruple by refusing to doff their hats in court, many Quakers were punished, although some authorities, such as Charles II, respected their belief and declined to penalize them.

Every child and student of American history knows of the intense persecution and suffering endured by William Penn who firmly refused to salute the King of England by removing his hat in the presence of that monarch—the popular custom and current salute of that day. He founded Pennsylvania as a haven for persecuted Quakers who fled from bitter hostility shown against them in England to the new commonwealth where they found refuge in a "land of liberty".

Men who had been persecuted in England and continental Europe fled from such lands of oppression and came here in a constant stream while they hewed out of the wild forests the beginning of this Nation.

The founding fathers who wrote the Bill of Rights wisely wrote in plain but general terms the injunctions contained in the First Amendment so as to guarantee to their posterity freedom of conscience and protect them against the terrible persecutions from which they and their forefathers fled. There can be no doubt that allowances were intended to be made for men with "crochety" beliefs, such as William Penn and his brethren, who would not salute the state or any image thereof, animate or inanimate. There can be no doubt that the writers of the Constitution did intend that this guarantee of the right of supremacy of conscience in proper fields should not be impaired by judicial amendment, but should be enforced by judicial decree.

B

History of modern-day salute to the flag, and the right of Jehovah's witnesses conscientiously to refuse to participate therein.

When flag saluting was introduced at public school ceremonies in 1892, four hundred years after Christopher Columbus landed on American shores, James B. Upham, of Malden, Mass., wrote a pledge of allegiance which gained wide currency through its publication in *The Youth's Companion* magazine. (See *Encyclopedia Americana*, Vol. 11 [1942 ed.], p. 316.) Thereupon a campaign was launched to have the United States flag placed in every school house and that it be saluted ceremoniously by all school children on the anniversary of the landing of Columbus. In the fall of 1892, the flag-salute ceremony appeared in this country at the National Public School celebration.

In 1907 the first compulsory flag-salute regulation appeared in Kansas. Thereafter, until more recent years, compulsory participation in the ceremony did not increase or prosper; on the contrary, it disappeared until the rise of "fascism" and "nazism" in continental Europe. Concurrently with the spread of totalitarianism various states of the Union passed laws requiring the compulsory flag salute in schools. Between 1935 and 1939 eighteen states saw fit to expel children who refused to salute the national flag because of conscientious objection. Since the *Gobitis* decision (*Minersville Dist.* v. *Gobitis*, 310 U. S. 586) in June 1940 and the present national emergency, children who refuse to salute the flag have been expelled in every state of the Union.

History of the flag-salute regulation is discussed in greater detail by Judge Clark in his opinion in the *Gobitis* case (CCA-3, 108 F. 2d 683). In recent years much has been said in controversy concerning the attitude of Jehovah's witnesses toward flags. No real American patriot can truthfully accuse Jehovah's witnesses of disrespect to the flag

of the Nation, but in consequence of the malicious designs of enemies of these sincere followers of the Lord Jesus Christ, their Scriptural attitude, which is one of proper respect, has been greatly misrepresented and grossly misinterpreted. The position and view of Jehovah's witnesses toward the emblem of the Nation was well stated by the late Judge Rutherford at Detroit, Michigan, in 1940, shortly after mob violence began to sweep the country. That spokesman for Jehovah's witnesses then publicly said:

> "The flag is a symbol of a government the principles of which were established on righteousness by men who loved God."

He pointed out also that Jehovah's servants are not against the flag nor the things for which it stands. On the contrary, they respect the flag and the high principles for which it is the symbol. Such respect they show, without hypocrisy, by obeying conscientiously all laws of the land which are in harmony with righteousness and not in conflict with laws of the Supreme Being, and which laws do not require them to violate their covenant with Almighty God, JEHOVAH. So doing, they render first unto God that which is God's and unto Caesar that which is Caesar's.—Matthew 22:21.

In *Halter* v. *Nebraska*, 205 U. S. 36-41, this honorable Court held that the flag "is an emblem of sovereignty".

To many persons the saluting of a national flag means nothing. To a sincere person who believes in God and the Bible as His Word, and *who is in a covenant with Almighty God to do His will exclusively*, it means much. To such person "sovereignty" means the supreme authority or power. Many believe that "the higher powers", mentioned in the Bible at Romans 13:1, means the "sovereign state"; but to the Christian this means *only* JEHOVAH GOD and His Son, Christ Jesus, Jehovah's anointed King. They, Father and Son, are THE HIGHER POWERS, to whom all must be subject and joyfully obey.

Concerning the flag *The Encyclopedia Americana*, Volume 11 (1942 ed.), page 316, says:

> "The flag, like the cross, is sacred. . . . The rules and regulations relative to human attitude toward national standards use strong, expressive words, as, 'Service to the Flag,' . . . 'Reverence for the Flag,' 'Devotion to the Flag.'"

Webster's International Dictionary defines the words above used as follows:

> SACRED, set apart by solemn religious ceremony
> DEVOTION, a form of prayer or worship
> REVERENCE, veneration, expressing reverent feeling, worship
> SALUTE means to greet with a kiss or bow and courtesy, the uncovering of the head, a clasp or wave of the hand or the like; . . . to honor formally or with ceremonious recognition. (See Century Dictionary, page 5321.) To greet with a sign or welcome, love or deference, as a bow and embrace, or a wave of the hand. (Webster)

It is conceded that the flag is a symbol of the State, an image which represents the State.

Under the word "image" this comment is given by Webster: "Image, in modern usage, commonly suggests religious veneration."

According to the Bible, to bow down to a symbol or image includes all postures or attitudes toward the image, even a kiss. See 1 Kings 19:18; Hosea 13:2; Job 31:25-27.

Any token of reverence is a bowing down to. See Webster's International Dictionary under the word "bow".

It appears from the recognized lexicographers that saluting a flag is a religious formalism, as much so as when the ancient Assyrians and Egyptians showed respect to

their standards. According to the Bible, there cannot be the slightest doubt about it, because by such salute there is bestowed upon the image or thing, reverence, devotion, and a form of prayer or worship, and which thing or image or that which it represents is regarded as *sacred*.

Appellees sincerely believe the Word of God and conscientiously believe that saluting a flag is a violation of His Law. Any willful disobedience to God's Law means *to them* complete or eternal destruction, at the hand of Almighty God. "For Moses truly said unto the fathers, A prophet shall the Lord your God raise up unto you of your brethren, like unto me; him shall ye hear in all things, whatsoever he shall say unto you. And it shall come to pass, that every soul, which will not hear that prophet, shall be destroyed from among the people."—Acts 3:22, 23; Deuteronomy 18:15.

A rule which compels school children who are Jehovah's witnesses daily to participate in a formal ceremony by placing the hand over the heart (which is symbolic of loving devotion) and then extending the hand in a salute to a flag, a symbol of the State, and at the same time repeating formal words by which the State is recognized as the "higher power" and thereby attributing to the State protection and salvation, is compelling those children to adopt and practice what *to them* is a religious ceremony. To those children who are in a covenant with Jehovah God to obey His will, such formal ceremony or practice is compelling them to perform an act of idolatry, contrary to the command of Almighty God, which command such children conscientiously believe, rely upon and cannot ignore or transgress.

This raises the question, What is a *religious* belief? Based upon the Bible, the proper definition of religion is this: A formal ceremony of reverence, adoration, devotion, or praise, practiced or indulged in by human creatures and directed toward, or bestowed upon some creature as a higher power, real or fancied, thereby attributing to such higher power sovereignty, protection and salvation, is a

religion. Since such ceremony ignores the specific commandment of Almighty God, that ceremony is idolatry.—Matthew 15:1-9; Acts 10:21-26; 17:16-29; Revelation 19:10; 22:8, 9; Exodus 20:12; Isaiah 29:13; 44:8-10; John 4:23.

The foregoing Bible definition of religion is further supported by what follows: Paul, at one time a Pharisee and as such a practitioner of religion, said, "I am a Pharisee, the son of a Pharisee." (Acts 23:6) When before King Agrippa, he said: "After the most straitest sect of our religion I lived a Pharisee." (Acts 26:5) After Paul became an active follower of the Lord Jesus Christ, an apostle of His and one of Jehovah's witnesses, he wrote words recorded in the Bible at Galatians 1:13, 14, "For ye have heard of my conversation in time past in the Jews' religion, how that beyond measure I persecuted the church of God, and wasted it; and profited in the Jews' religion above many my equals in mine own nation, being more exceedingly zealous of the traditions of my fathers." Religion is taught by the traditions of men. (Matthew 15:1-9) God's worship, taught by Jesus Christ, is based entirely upon the Word of Almighty God, the Bible, which is the truth.—John 17:17; 18:37; 8:32, 40; Matthew 4:10; Psalm 119:142.

Should not all citizens be loyal to the country in which they live? Emphatically YES. Jesus stated the correct rule, to wit: "Render to Caesar the things that are Caesar's, and to God the things that are God's." (Mark 12:17) Caesar was the totalitarian, arbitrary ruler representing the government of Rome. He stood for the State. The Lord Jesus Christ declared that everything to which the State was entitled, such as payment of ordinary taxes, should be rendered unto the State. He then added that everything to which God is entitled should be rendered unto God. Clearly that means God is Supreme, that His Law is above the law of the State, and that laws of the State which are in harmony with God's Law should be readily obeyed. Appellees follow that rule. They are diligent to obey every law of the State not in conflict with the Law of Almighty God. Any rule or

law enacted in the State of West Virginia that is contrary to God's Law is void.

Some contend that refusal to salute a flag is not a conscientious belief reasonably supported in the Bible. So to hold is wrong, because the law of the United States and of this Court specifically define that no person has the right to say whether or not the act of another is not a genuinely obedient act of worship of Almighty God. See *Reynolds* v. *United States*, 98 U. S. 145, 162, where this Court cites with approval the Virginia Statute for Religious Freedom, the preamble of which defines religious freedom, as follows:

> "'that to suffer the civil magistrate to intrude his powers into the field of opinion, . . . is a dangerous fallacy which at once destroys all religious liberty', and 'it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order'."

In July 1942 the Kansas Supreme Court, in the case of *State* v. *Smith and Griggsby*, 155 Kans. 588, 127 P. 2d 518, held that the compulsory flag-salute regulation, when applied to Jehovah's witnesses, violated the Kansas Bill of Rights granting freedom of worship of Almighty God and freedom of speech. That court said:

> "We are not impressed with the suggestion that the religious beliefs of appellants and their children are unreasonable. Perhaps the tenets of many religious sects or denominations would be called reasonable, or unreasonable, depending upon who is speaking. It is enough to know that in fact their beliefs are sincerely religious, and that is conceded by appellee. Their beliefs are formed from the study of the Bible and are not of a kind which prevent them from being good, industrious, home-loving, law-abiding citizens. Upon this point the evidence is clear."

It is noteworthy that Kansas, the first state (1907) to enact compulsory flag-salute legislation, in 1942 became the first state to declare such compulsory regulation invalid as to Jehovah's witnesses. And furthermore, that the Kansas Supreme Court flatly refused to follow the *Gobitis* decision, holding that the Kansas Bill of Rights was not as weak as the Federal Bill of Rights 'watered down' by the Court in the *Gobitis* case.

To hold otherwise is to make freedom of worship an uncertainty. It would depend on the religious complexion of the particular individual who occupied the bench and not on the fundamental concept of liberty, to wit, that the courts would never enter into the field of conscience, and that all "religious" beliefs will be conceded as true.

The *way* of worshiping Almighty God as done by appellees and Jehovah's witnesses is commanded by the written Law of ALMIGHTY GOD. God's Law is supreme! This rule is recognized by Blackstone in his *Commentaries*. (Chase 3d ed., pp. 5-7) See also Cooley's *Constitutional Limitations*, 8th ed., p. 968. Appellees greatly desire to have life and to live, and therefore each of them must serve Almighty God; for it is written that God is the fountain of life. (Psalm 36:9) One who desires to live must obey God's law. (John 17:3) Appellees and their children stand in the same position as Jesus Christ's apostles who were haled before magistrates and ordered to discontinue their preaching the gospel and for their refusal to "heil" or salute Caesar and the Jewish clergy. Those apostles told the court, "We ought to obey God rather than men." (Acts 5:17-42) Thereafter, as it is written concerning those faithful followers of Jesus Christ, "daily in the temple, and in every house, they ceased not to teach and preach Jesus Christ."—Acts 5:42.

In *Watson* v. *Jones*, 80 U. S. 728, the principle is stated thus:

> "In this country the full and free right to entertain any religious belief, to practice any religious prin-

ciple, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

Since it cannot be shown that the conduct of appellees and their children involves a violation of the laws of morality, infringes personal rights or presents a case where there is *a clear and present danger* that the government will be overthrown by violence, the application of the statutes and regulations in question wrongfully deprives appellees of the aforesaid constitutional rights. Other statutes, concededly valid on their face, when applied to conduct of Jehovah's witnesses have been declared unconstitutional.

We suggest that no American court or executive agency should presume to tell any person that he is wrong in his opinion as to how he may best serve the God in whom he believes. It should, we submit, be deemed inadmissible for a court to brush aside a sincere conscientious objection because the same scruple is not held by most of the people, or because in the court's own view the scruple is theologically inapt.

Neither the legislative nor the judicial department of the American system of government has power to declare that a given practice does not and cannot carry a religious significance, in the face of an individual's sincere and honest determination that *for him* a religious significance exists. To hold otherwise and thus to deny the right of private judgment as to what carries a "religious" meaning would, we submit, strike at the heart of religious freedom.

The issue as to whether the individual should be the sole judge of his own religious belief is a very old one. For centuries, various sects have honestly ascribed religious significance to acts and ceremonies that, to the vast majority held no religious meaning whatever.

It seems that the judicial unwillingness of some of the Justices of this Court who joined in the majority opinion in the *Gobitis* case and failed to concede the religious nature of the salute arises largely from the novelty and strangeness of the particular objection here made to it, and from the fact that Jehovah's witnesses are a comparatively small group. Supposing that this same objection had been raised by a known and respected group such as the Quakers, is it not possible or probable that the courts would have recognized the actuality of the religious significance attributed to the salute? Or if one of the largest religious denominations should have adopted the construction of God's commandment which is believed and taught by Jehovah's witnesses, so that hundreds of thousands of American citizens sincerely ascribed religious significance to the flag salute, is it not most probable that the majority of this Court would have had no difficulty in recognizing such significance?

The record of history shows that the existence and seriousness of beliefs formed from the study of the Bible are not to be measured by the current opinions of the time. History shows that the existence of "religious" scruples lies in truth and fact within the breast of the individual and nowhere else; and no current opinion or fiats of legislatures or courts have ever been able to establish that a particular act or ceremony has no religious significance when the individual himself asserts the contrary.

The present dominance of totalitarian ideas in other parts of the world suggests that an extension of legislative power in this direction should be viewed with suspicion and, *in the absence of a showing of clear necessity*, should be condemned as a deprivation of individual liberty without due process of law.

It is important to recognize that the *compulsory* flag salute is an entirely different thing from the *voluntary* salute.

If a person desires to salute the flag or to "heil" men, that is HIS privilege and no human power can properly

interfere with his so doing. But there is a *vast difference* between such a person and one who has made a *solemn covenant to be obedient to Almighty God*, the breaking of which covenant is IDOLATRY. Appellees and their children are in a covenant to be obedient to Almighty God; and this is conceded. They are conscientious in their belief and practice. That is conceded. In all good conscience they render obedience to the laws of the State, when such laws do not violate God's Law. They fully recognize and believe that one who voluntarily breaks his covenant with Jehovah God will suffer everlasting destruction.

The difference may be illustrated by the familiar custom that a gentleman raises his hat upon meeting a lady of his acquaintance on the street. The gesture is ordinarily regarded as a simple token of courtesy and its omission may lead to disapproval socially. It does not follow, however, that a statute *requiring* the gesture would be constitutional, especially in the face of a "religious" objection. If a Quaker should object to the ceremony on the religious ground suggested in the quotation from Barclay set out at page 20, supra, the invalidity of the requirement *as to him* would seem clear.

C

Jehovah's witnesses are not a sect or cult as are popular recognized religions, but are Christians following Jehovah God and no man. They have no earthly leader.

A *sect* is defined as a religious order or group having in common an earthly leader, or distinctive doctrine, or way of thinking based on doctrines and precepts handed down by man to man.

Jehovah's witnesses do not come within the definition of a sect or a cult. Jehovah's witnesses are those who bear testimony to the supremacy of Almighty God "whose name alone is JEHOVAH". (Psalm 83:18) They declare His name and His revealed purposes concerning His creatures.

They have no human leader. No man organized them. They are not a recently organized group. Jehovah's witnesses have been active on earth at all times during the six thousand years last past. They are those who recognize their Maker, Almighty God, as the Supreme ONE of all time, past, present and future, whose Chief Witness was and is His faithful Son, the Lord Jesus Christ, whose high position of leadership was typified and foretold by Jehovah's faithful servant, Moses, more than three thousand years ago. (Deuteronomy 18: 17-19; Acts 3: 22, 23) Jesus Christ's apostle Paul, who was one time a member of the supreme court of Jerusalem, in the eleventh chapter of Hebrews submits a long list of such men, commencing with Abel, who was slain by his brother Cain. All of those are designated by the apostle as *witnesses* for Almighty God, JEHOVAH; and their course of faithful obedience to the Supreme One is set forth as an example to every one who follows in the footsteps of the Lord Jesus Christ. The prophecy of Isaiah, written about three thousand years ago, expressly calls all men who are in a covenant to do the will of Almighty God and who fulfill that covenant *Jehovah's witnesses*. Jehovah Himself so names them. It is fair to this Court, therefore, that we state that appellees are not here representing some religious sect. In this land there have been Jehovah's witnesses ever since the founding of this nation. Every person who has stood for God and His Kingdom under the Lord Jesus Christ, is one of them.

The United States has been declared to be a Christian nation by this Court. In *Holy Trinity Church* v. *United States*, 143 U. S. 457, after a review of the authorities and history, it is said:

> "These and many other matters which might be noticed add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."

In the case of *Watson* v. *Jones*, 80 U. S. 728, it is said:

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

The converse of this is true also. This Court will not permit *Christianity* to be attacked, persecuted and discriminated against while the recognized religious sects and their followers are permitted to enjoy the fundamental rights, privileges and freedoms guaranteed by the First Amendment.

We think that what Mr. Justice Roberts said in the case of *Cantwell* v. *Connecticut*, 310 U. S. 296, is appropriate here, to wit,

> "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed. Nowhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."

D

When applying the "clear and present danger" test the compulsory enforcement of the regulation cannot be sustained.

The admitted facts show that the refusal to participate in the ceremony does not involve a violation of the law of morals or present any other exception authorizing invasion of the right. The allegations in the complaint, admitted by the appellees to be true, establish that there is *no clear and present danger* that interests of the state or nation will be affected. It is therefore the duty of the Court to declare the regulation unconstitutional as construed and applied.

Before this inherent right of freedom to worship can be encroached upon there must be presented some *clear and present danger* that the act of refusal to salute the flag will immediately invade rights of others and be immediately inconsistent with the peace or safety of the State. This rule is very clearly exemplified in the case of *Bridges* v. *California*, 314 U. S. 252. Here we adopt that entire opinion as our further argument here. We also refer to the dissenting opinion of Justice Brandeis in *Whitney* v. *California*, 274 U. S. 357, 372, and *Schenck* v. *United States*, 249 U. S. 47, 52, where he said:

> "The question in every case is whether words used [or refusal to act] in such circumstances are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent." [Italics added]

A fair application of the provisions of the First Amendment does not permit this Court to go as far as it did in the *Gobitis* case. The *clear and present danger* test does not support the conclusions of such case. The State can only intervene when there is an abuse of the exercise of the right of conscience. Freedom of worship is not abused un-

less and until there is a clear and present and immediate danger that the government will be overthrown by force and violence or that the educational processes will be destroyed and impaired by granting the children here their liberty of conscience. The admitted facts eliminate any such possibility from consideration here. It is to be noticed that the *Gobitis* decision justifies the abridgment in that case because of the possible tendency of the flag salute toward "cohesive sentiments", "continuity of a common life", "common feelings", "unifying sentiment", etc., all of which *possible tendency* doctrines are from the Eighteenth Century doctrines applied under the old common law in the days of censorship, license of the press and speech, and supremacy of the legislature, which are wholly at variance with present-day principles of freedom established in decisions of this Court. The *Gobitis* case doctrine permits the government to go outside its proper field of acts, present, probable or possible, into the field of ideas and opinion, which cannot be invaded under any circumstances, and to condemn them by the judgment of a judge, jury, school board, etc., who, concerning a doctrine they dislike, would rule it to be so likely to cause harm some day that it had better be nipped in the bud.

Comparing the *Gobitis* doctrine with the doctrine of *clear and present danger*, it is well to consider the words of Mr. Justice Black, speaking for this Court, in *Bridges* v. *California*, supra:

> "No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. . . . Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary,

> the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society."

The *clear and present danger* test permits the development "unmolested and unobstructed" of the "many types of life, character, opinion and belief" which "may seem the rankest error to his neighbor". It avoids the risk of suppressing disagreeable truth and the denial of education to children with "crochety beliefs" so long as there is no imminent danger of the beliefs or practices impairing the interest which the state is designed to protect. By applying and maintaining this principle only can the nation survive as a democracy with freedom for all. The very best way to increase discontent among the people, impair national unity, destroy cohesion of the people and to destroy the self-confidence of the people is to allow the suppression of a small minority under general statutes and regulations of this sort so as to deny children proper education. If it can be done to Jehovah's witnesses, then any reasonable person would know that it can be done to a group less unpopular until freedom of conscience had been suppressed to all except those in favor of the political power in office. The threat thus received by true followers of Jesus Christ under general statutes and regulations of this sort impairs democracy in this country. Allowance of children with "crochety beliefs" in schools is to be welcomed, not feared, even if it casually involves the right of such children to be excused for conscience' sake from such ceremonies in question. In this connection, see the dissenting words of Mr. Justice Holmes, in *United States* v. *Schwimmer*, 279 U. S. 644, 654:

> "If there is any principle of the Constitution that more imperatively calls for attachment than any other

it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."

The safety of the State is placed in greater danger in the *long run* by a denial of the right of education to thousands of children because of their conscience. It is a known fact that education in public free schools has contributed more to the progress, success and enlightenment of the United States than any other one thing. It has afforded to the poor and weak an equal opportunity to learn with the rich and wealthy. In other lands education has been the prerogative only of the ultrarich and wealthy and those who suffered poverty remained in a pall of ignorance from the day of their birth to the time of death, which condition has done more to hold back other nations while the United States, with free public education for all which stirred up the minds of its young to action and new discoveries in science, art, etc., jumped ahead in the field of commerce, learning, science and art above all other nations in the earth. Therefore free public school education for all children, regardless of whether the parents are rich or poor, popular or unpopular, bond or free, white or black, is of far greater importance to the welfare and progress of the nation than is the regimentation of the children at school by forcing "conscientious objectors" to surrender their allegiance to Almighty God, the Giver of life itself, as a condition precedent to enjoying the facilities guaranteed to all. The fact that education is made compulsory and punishment is provided for parents who fail to provide the education in every state of the Union proves the answer to the question. Public education for the children is of greater importance than forcing them to salute the flag.

It is a known fact that there are many friendly aliens in the country who do not give allegiance to this government and who are allowed to attend the schools and other-

wise enjoy rights of education, etc. Also there are many enemy aliens residing in the land who are permitted to enjoy rights and privileges of education, etc., on an equal basis with citizens. The exception to this is the interned dangerous enemy alien and the case of the Japanese in the defense areas along the west coast. Several hundred thousand Italian aliens were restored to their rights of friendly aliens by order of the Attorney General. Even this Court unanimously refuses to deny to the enemy Japanese alien his right to protect his legal rights in the courts. All the foregoing democratic liberties are accorded to enemy aliens because there is no clear, present and immediate danger to the nation in this *time of war* by allowing such liberty to such aliens. We submit that if this fairness and liberality can be shown the enemy alien, then why cannot this court secure to innocent, inoffensive and harmless children of Jehovah's witnesses, native-born American citizens, the protection of their constitutional and legal rights? Surely no one who is in possession of all his endowment of reason, justice and mercy would have the hardihood to contend that a little child, courageous, bold and fearless in his unbreakable devotion to Almighty God presents a greater danger to the nation by refusing to violate his conscience through saluting the flag than do the hundreds of thousands of enemy aliens, lo millions, who are in possession of liberty and freedom while the nation battles their fatherland for the preservation of the four freedoms.

E

The inherent, constitutional and absolute power of the parent to direct the spiritual education of the child, and his power to direct the secular education of the child in public and private schools, is recognized as superior to the right of the State declared in regulations or statutes, and has been recognized and sustained by this and other courts.

Marriage and childbearing is God's arrangement for all humankind that shall live on the earth. (Hebrews 3:4) It is beyond the power of the State to interfere with or abridge the right of all persons within its boundary to *procreate*. (Genesis 9:7; Psalm 127:3) Even this right cannot be denied to criminals. *Skinner* v. *Oklahoma*, 316 U.S. 535. *A fortiori*, the State cannot interfere with and abridge the parents' right to bring up children in a way acceptable to their own judgment so long as it is not inimical to the welfare of the children or the well-defined interest of the state.

The children must be taught by the parents to be obedient to the Lord and His commandments or rules found in the Bible. Upon the parents is placed the duty to teach their children morality, honesty, integrity, obedience and meekness and, above all, the commandments of Almighty God, JEHOVAH.

Upon all parents who are in a covenant to do God's will there is laid the duty and specific obligation to teach their children the Word of God and it is the duty of the children to obey their parents who give such instruction. The parent will be diligent to bring his children to congregations where the commandments of Almighty God are studied and discussed. The children are p mitted to participate therein so that they might learn the way of righteousness and how they might receive life everlasting. When Moses stood before Jehovah's typical covenant people on the plains of Moab and delivered the instruction from Jehovah he knew that soon thereafter the children would take the place of

their parents in the ranks of God's nation. Forcefully he urgently reminded the parents of their duty to their children. He urged upon them diligence and faithfulness in teaching the truth to their children. That was important then; the fulfillment thereof is of greater importance now. See Deuteronomy 4:9, 10; 6:5-8; 11:18-21; 12:28; 31:10-13; 32:46. The apostle of Christ Jesus also states the command thus: "And, ye fathers, provoke not your children to wrath; but bring them up in the nurture and admonition of the Lord." (Ephesians 6:4) The children also are commanded: "Children, obey your parents in the Lord; for this is right. Honour thy father and mother; which is the first commandment with promise; that it may be well with thee, and thou mayest live long on the earth."—Ephesians 6:1-3.

"Nurture" means to discipline and train the child in the way of righteousness; and such way of righteousness God has marked out in His Word. The words "right" and "righteous" are from the same root word and mean the same thing. "Admonish" means to teach and instruct; to counsel and advise the children of and in accord with the expressed will of God set forth in the Bible. Parents who failed thus to instruct their children would be provoking their children to do wrong or to wrath.

To permit the child to *believe* in righteousness and to refrain from *practicing* right is entirely wrong. "For as the body without the spirit is dead, so faith without works is dead also." (James 2:26) "Let your light so shine before men, that they may see your good works, and glorify your Father which is in heaven." (Matthew 5:15, 16) It is therefore the duty and privilege of parents and children to *practice what they preach* by consistently acting as Jehovah's witnesses, and consistently refusing to salute the flag of any nation.

It cannot be said that children are too young to be permitted thus to worship and serve Jehovah God. The State has no authority or power to tell a child at what age it can

begin practicing the requirements of Almighty God taught it by the parent. Thus to allow the State to intervene would forever destroy and end the unalienable American heritage of the right to maintain a home, raise children and follow generally the pursuits of happiness enjoyed by a free people. The State can intervene with respect to the care and education of the child only when the parent "neglects" or "misuses" the child to such an extent as to endanger its welfare and the interests of the State. So long as the parent does not violate this fundamental rule, the State cannot interfere with the "religious" practices of the parents and children.

The words of Mr. Justice Page of the New Hampshire Supreme Court (*In re Lefebvre*, 20 A. 2d 185) seem appropriate and fitting here:

> "Loving parents who do their best for their children in support, nurture and admonition are of more worth than pecuniary means. Righteous and generous motives may be of more importance than notions that chime with majority opinions of what is good form or what is the best method of teaching patriotism. . . . But in view of the sacredness in which the State has always held freedom of religious conscience, it is impossible for us to attribute to the legislature an intent to authorize the breaking up of family life for no other reason than because some of its members have conscientious scruples not shared by the majority of the community, at least provided those scruples are exercised in good faith, and their exercise is not tinged with immorality or marked by damage to the rights of others."

See also *Reynolds* v. *Rayborn*, 116 S. W. 2d 836, where Chief Justice Jackson of the Texas Court of Civil Appeals said:

> "History is replete with the bigotry, intolerance, and dogmatism of religious sects, and the pages there-

of are strewn with martyrs who died for their faith. The divergence in creeds, the evils growing from a union of church and state, and the conflicts for supremacy waged between the two were studied and considered by the colonial pioneers who established the independence of these United States. They profited by peoples whose experiences in government had failed, as well as by the achievements of those whose governments had been more successful, and to avoid the griefs and disasters arising from the bigotry and religious intolerance of the preceding ages, they provided in our fundamental laws, Amendment 1 of the Constitution of the United States, that the 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' . . .

"The flag is emblematic of the justice, greatness and power of the United States—these, together, guarantee the political liberty of the citizen, but the flag is no less symbolic of the justice, greatness, and power of our country when they guarantee to the citizen freedom of conscience in religion—the right to worship his God according to the dictates of his conscience. Beyond my comprehension are the vagaries of people who claim and accept the protection of their government in order to worship God according to the dictates of their conscience, but refuse to salute their country's flag in recognization of such protection. Yet, however reprehensible to us such conduct may be, their constitutional right must be held sacred; when this ceases, religious freedom ceases." [4]

The right of the parent to direct the education of the child in public or private schools has been fully recognized by this Court. See *Meyer* v. *Nebraska*, 262 U. S. 390, where

[4] See the recent case of *Stone* v. *Stone*, ... P. 2d ..., decided Jan. 25, 1943, by the Supreme Court of Washington, involving the same question, and which court refused to follow the *Gobitis* case.

was set aside a conviction of a person who taught the German language to children in public schools contrary to a state statute. It was held that the statute infringed the right of the individual to marry, establish a home, bring up children and to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. See also *Pierce* v. *Society of Sisters*, 268 U. S. 510, where the Oregon Compulsory Education Law requiring all children to attend public schools unreasonably abridged the constitutional right of parents to direct the upbringing and education of children under their control. Also see *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589; and *Berea College* v. *Kentucky*, 211 U. S. 45, 67.

The Fourteenth Amendment to the United States Constitution guarantees not only freedom from unlawful physical restraint, but also the right to enjoy the facilities of the State on *equal* terms with others. This principle is well stated by this Court in *Allgeyer* v. *Louisiana*, supra:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint to his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

In another case, *Berea College* v. *Kentucky* (1908), supra, this Court, speaking through Mr. Justice Harlan, said:

> "The capacity to impart instruction to others is given by the Almighty for beneficent purposes and its

use may not be forbidden or interfered with by Government—certainly not, unless such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property—especially where services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's [fundamental personal] liberty as guaranteed against hostile state action by the Constitution of the United States . . . The right to enjoy [i. e., exercise or practice] one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the liberty inherent in the freedom secured by the fundamental law."

In this connection we call attention to the case of *State ex rel. Finger* v. *Weedman*, 55 S. Dak. 343, 226 N. W. 348, where the Court, in a case with identical principles involved here, among other things said:

"The primary purpose of each [constitution] is to insure religious freedom. Any act which interferes with such liberty is necessarily contrary to the spirit and purpose of the constitution, and therefore forbidden, whether expressly named therein or not, and, on the other hand, any act which does not so interfere is not unconstitutional unless expressly enumerated. . . .

"The persecution of our forefathers was merely one organization fighting another organization, and none of them fighting the living principles of the Bible, one trying to force on another its construction of the Bible and mode of worship. The primary object of the constitutions was to prevent that form of persecution.

"... History of the conflicts between Catholics and Protestants over those very differences refutes such conclusion. It makes no difference what our personal views may be as to the importance of the controversial words. As officers of the state, speaking for the state, neither we nor the teachers of the public schools can say that one side is right and the other wrong. We must leave that to the conscience of those involved.

"Parents with children of tender age may feel that it is their religious duty to give to the child proper religious instruction and to guard it from heresies. Consequently, if the state teaches religion, many parents will, because of their religious belief, keep their children from such teaching, and thereby be deprived of all public school privileges."

In 1 Corinthians 10:27-30 it is said, 'For why is my conscience judge of another man's conscience?'

See also *Kaplan* v. *Ind. School Dist.*, 214 N. W. 142.

The Supreme Court of Colorado, in *People ex rel. Vallmar* v. *Stanley et al.*, 81 Colo. 276, 282; 265 P. 610, held that a child of Catholic parents had the constitutional right to insist on being permitted to withdraw from the room while the ceremony of reading the *King James Version* of the Bible was conducted. The court held that such ceremony forced upon Catholics who believed in the authenticity only of the *Douay Version* was an infringement of the constitutional rights of the parents and children. There the court said:

"The parent has a constitutional right to have his children educated in the public schools of the State, Colo. Const. Art. IX, Sec. 2. He also has a constitutional right, as we have shown, to direct, within limits, his children's studies."

The Colorado Court of Appeals in *Florman* v. *School District No. 11*, 6 Colo. A. 319, 322; 40 P. 469, said:

> "The education of the children of the state is a duty which devolves upon state government."

In *Hardwicke* v. *Board of School Trustees*, 54 Cal. A. 696, 205 P. 49, the parents entertained conscientious objections to their children being required to take dancing lessons in school. Instead of telling them they could educate their children elsewhere, the court sustained their objections and upheld the right of the pupils to attend school without participation in the exercises.

In *Spiller* v. *Woburn*, 12 Allen (Mass.) 127, the school committee of Woburn had made an order requiring the reading of the Bible and prayer at the opening of school during which each pupil should stand with head bowed. The court held that any pupil did not need to join in the ceremony and could avoid any act of reverence, even to bowing the head, if the parents requested it. The court said:

> "Having in view the manifest spirit and intention of these provisions, an order or regulation by a school committee which would require a pupil to join in a religious rite or ceremony contrary to his or her religious opinions, or those of a parent . . . would be clearly unreasonable and invalid."

Children of parents having conscientious objections to the ceremony have been held to possess the constitutional right to direct the school authorities to excuse their children from the Bible reading ceremonies in other states. See *State* v. *Schieve*, 91 N. W. 846 (Nebraska); *Weiss* v. *School District*, 76 Wisc. 177; *People* v. *Board of Education*, 245 Ill. 334, 92 N. E. 251; *Herold* v. *Parish Board*, 136 La. 1034, 68 So. 16.

The constitutional right of parents not to have certain

subjects taught to their children in the public schools has been sustained. *Rulison* v. *Post*, 79 Ill. 303 (Bookkeeping); *Trustee* v. *People*, 87 Ill. 303, 29 Am. Rep. 55 (Grammar); *State ex rel. Kelley* v. *Ferguson*, 95 Neb. 63, 144 N. W. 1039 (Domestic Science); *State* v. *Mizner*, 50 Iowa 145 (Algebra); *Morrow* v. *Wood*, 35 Wisc. 59 (Geography).

In *Pierce* v. *Society of Sisters*, 368 U. S. 510, 534-535, an injunction was granted restraining enforcement of a state statute which required all children to attend the public schools. That Oregon law was held unconstitutional. The Court said:

> "Under the doctrine of Meyer v. Nebraska, 262 U.S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of the parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children. . . . the child is not the mere creature of the State; those who nuture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

It is submitted that if the state does not have the authority to compel a child to attend a public school to the exclusion of private schools, then the state does not have authority to compel a child to perform a public cerémony involving the *national* flag contrary to his private conscientious belief.

In *Meyer* v. *Nebraska*, 262 U.S. 390, this Court held that a statute providing for punishment of one who taught the German language in the public schools was an

unconstitutional violation of the freedom of speech, saying:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . . . [citing many authorities].
>
> " . . . The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. Lawton v. Steele, 152 U. S. 133, 137."

See, also, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; *Farrington* v. *Tokushige*, 273 U. S. 284.

F

The advantages supposed to flow from the compulsory flag-salute regulation to the interests of the State are not sufficient to justify the denying of education to children who refuse to salute the flag for conscience' sake, and the conflict between the two interests presumes the regulation to be unconstitutional. [5]

When legislation undertakes to restrict or override conscientious beliefs it runs head on against a great affirmative principle expressly declared by the First Amendment and embodied in national emotions since the landing of the Pilgrims. So strong is the policy of safeguarding the basic individual liberties—including religious freedom—that the presumption should be against, rather than for, the validity of any statute abridging those liberties. Therefore, we submit that it would not be sufficient for the Court here to accept the mere opinion of other men. We respectfully submit that in a case of this kind the Court should *itself* be convinced of the existence of a public need which is sufficiently urgent to override the great principle of religious freedom and freedom to worship Almighty God in this particular case.

Furthermore, the position of appellants here is opposed by the statements of authorities on educational psychology which are noticed in the opinion of the United States Third Circuit Court of Appeals in the *Gobitis* case, 108 F. 2d 683. These statements are to the effect that the compulsory flag salute not only is ineffectual to accomplish the purpose of inculcating patriotism, but may indeed tend to dull patriotic sentiment.

We emphasize that the alleged public need in this case does not admit of proof like ordinary issues of fact or even the special issues of fact involved in the usual *due process*

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[5] The greater part of the argument on this proposition is taken from the brief of the Committee on Bill of Rights of the American Bar Association, filed in the *Gobitis* case.

cases. No eye-witnesses can say whether a child's morale and loyalty are actually increased after a compulsory salute opposed to his conscientious beliefs. The Court cannot depend on experts, because there are no experts. Opinions can be expressed one way or another about the effect of compulsory salutes, but these are based almost wholly in mere speculation. There are no considered researches. Nobody has made a psychoanalytical *investigation of the mental* reactions of children after a repugnant salute.

We submit that this is not a general law, such as is ordinarily enacted under the police power of the state to prohibit crimes, but is a special enactment that requires the expression of doubtful patriotic sentiment. The problems involved in determining whether a particular law is within the police power of the state are well summarized in Freund's work, *The Police Power*, page 133, Section 143, where he states:

> "The questions which present themselves in the examination of a safety or health measure are: does a danger exist? is it of sufficient magnitude? does it concern the public? does the proposed measure tend to remove it? is the restraint or requirement in proportion to the danger? is it possible to secure the object sought without impairing essential rights and principles? does the choice of a particular measure show that some other interest than safety or health was the actual motive of legislation?"

See, also, Freund, *The Police Power*, page 497, holding that if there is no reasonable connection shown between the means employed and the end reached, there is a duty to declare the statute unconstitutional when construed and applied to matters protected by the Constitution.

We do not understand it to be contended that the flag-salute ceremony has any practical consequences to popular

welfare or to the strength and resources of the government apart from the sentiments of loyalty which it is expected to arouse in the pupil's mind.

The above consideration may oblige the supporters of the compulsory flag salute to grant that coercion of children who refuse to comply with the salute upon "religious" grounds cannot induce loyalty *in them.* But they may suggest that the necessities of discipline require universal enforcement even if this means driving the children out of school. Such a position is, of course, familiar in military life. There coercion is often reasonable and necessary, since the very function of a military unit requires implicit and uniform obedience; and to obtain this, all non-compliance with orders, reasonable or unreasonable, must be firmly dealt with in furtherance of the very purpose for which the unit exists. The fallacy of attempting to apply this analogy to school life lies in the difference between the purposes of school education and the purposes of an army. The function of an army is to fight, and for that very reason to achieve a disciplined and regimented organization. But the purpose of *American* schools is primarily to impart knowledge and to prepare for life under free institutions. The purpose is *not* to turn out a regimented group seasoned to coercive methods.

When an examination is made of the other situations where it has been declared that religious liberty must give way to a legal requirement, the public need for such a requirement is obvious to sensible men and very different from the vague conception of *morale* involved in the case at bar.

But the object of the present law is admittedly not to obtain definite useful services, but merely to produce a state of mind. An increase of loyalty is proposed to be caused in the child by requiring conduct which offends his spiritual convictions. The possibility of such a result is so contrary to human experience and so completely unsupported by evidence, that the case at bar is clearly differen-

tiated from the military service and other cases, such as *Hamilton* v. *Regents*, 293 U. S. 245, 262, and *United States* v. *Macintosh*, 283 U. S. 605.

In the case of *Schneider* v. *State*, 308 U. S. 147, 162-164, this Court held that matters of public convenience did not justify exercise of the police power so as to invade the realm of freedom of speech and of press. In other words, the Court held that where fundamental personal liberties are involved, the state is restricted in its choice of methods of regulation and may not, in attempted enforcement of such regulations, restrict or abridge freedom of press, speech or worship where the ends sought are remote.

Nor is this rule restricted to freedom of press and freedom of speech but it also extends to the right of freedom of "religion". In *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court well said:

> "Equally obvious is it that a state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

We do not question the right of the public schools to conduct regularly the flag-salute ceremony; but we do question the attempt to compel conscientious objectors guided by the Word of God to salute the flag or participate in the ceremony to specific commandment of Jehovah God. It is perfectly proper and lawful for one *not bound* by a covenant with Jehovah to salute the flag of the United States when that person desires to salute it. It is entirely wrong to interfere with that right or prevent such one from saluting the flag. Conversely, it is also true that it is wrong and illegal to *compel* one who, for conscience' sake, cannot participate in the ceremony.

When the conflict arises and the school enters upon the effort to compel the pupil then an entirely different problem is presented. Then the *compulsory* flag-salute regulation

must be weighed and appraised against the constitutional right of the pupil and his parents. If the means employed, that is, the *compulsory* flag salute, has no reasonable and direct connection with the ends aimed at, it is the duty of the Court to declare the statute and regulation unconstitutional when brought into collision with provisions of the First Amendment. See Freund, *The Police Power*, pp. 133, 497.

It is suggested that if education is to be denied to children *who are disloyal* to the American government, then a more certain and accurate method is essential to determine whether or not the child is loyal. The flag-salute ceremony is inadequate for such purpose. Since it is only an outward display of loyalty it can be performed by persons who do not *think* of, comprehend or understand[6] its significance or meaning; and, indeed, the ceremony could be participated in by one who is exceedingly *disloyal* to the government, the Constitution and the things for which the flag stands in order to avoid detection and give a hypocritical outward appearance of loyalty and patriotism.

The contention here raised is disposed of favorably to the appellees in the words of Chief Justice Hughes (dissenting with concurrence of Justices Holmes, Brandeis and Stone) in *United States* v. *Macintosh*, 283 U. S. 605, 634:

> "There is abundant room for enforcing the requisite authority of law as it is enacted and requires obedience, and for maintaining the conception of the supremacy of law as essential to orderly government, without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power. The attempt to exact such a promise, and thus to bind one's conscience by the taking of oaths or the submission to tests, has been the cause of many deplorable conflicts."

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[6] See APPENDIX A, page 91, infra, this brief.

Saluting the flag at most has only indirect possible effect upon the interests which can be protected by the state. It is manifestly foolish legislation when compared with the more urgent and needed legislation passed by Congress of the United States known as the "Selective Training and Service Act". It is noticed that the Congress of 1940 saw fit to accommodate the conscience of individuals by volunteering, contributing and providing exemption from military service for persons opposed thereto on reasonable grounds. If this does not endanger the safety of the nation, why cannot this Court enforce the exemption provided in the Bill of Rights to accommodate little children who conscientiously object to participating in the flag-salute ceremony?

G

The doctrine of supremacy of legislative declarations of policy of the state concerning general property rights claimed under the "due process" clause of the Fourteenth Amendment does not prevail where the legislative enactment is claimed to abridge the "civil rights" guaranteed by the First Amendment to the Constitution.

The declared guaranties of freedom of conscience, of worship, of speech and of press are statements by the people of this nation speaking directly to those who govern, and fixing the limitation of state and national governments and their subdivisions and subordinates, including school boards, when there is a conflict. Those express guaranties cannot be made to yield to the weaker, and at most indirect and oftentimes unauthorized, expression of the people through the legislature or school boards.

While it may be argued that the general rights of property protected and secured under the 14th Amendment to the Constitution may be required to yield to more specific statements of the legislature acting in a field of proper power, it cannot be said that any such requirement exists

with respect to the civil rights of personal liberty specifically guaranteed against all sorts of abridgments expressed in the 1st Amendment. When there is a collision between the stronger and express provisions of the first amendment with the stated policy of the legislature the decree of the legislature must yield unless such law or statute deals with an abuse of the rights guaranteed under the 1st amendment which is properly within the police power. It is admitted that the statutes drawn in question do not deal with an abuse of those rights. Before there can be an encroachment of these rights by laws enacted under the police power there must appear a clear and present danger that some interest which the state is authorized to protect from such abuse is immediately to be invaded. There is no such situation presented here.

The holding in the *Gobitis* case conflicts directly with the prior decision of this Court in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, where it is said:

> "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See Stromberg v. California, 283 U. S. 359, 369-370; Lovell v. Griffin, 303 U. S. 444, 452.
>
> "It is unnecessary to . . . enquire . . . whether prejudice against discrete and insular minorities may be special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

The words of Mr. Justice Roberts in *Schneider* v. *State*, 308 U. S. 147, are appropriate on the issues here presented, to wit:

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

In the *Gobitis* case it is said that the judgment of the legislature authorizing action of the school boards in promulgating the flag-salute regulation could not be inquired into or questioned *by the courts*. The Court does not discuss the limits of the police power of the state, does not discuss the circumstances when freedom of worship and conscience can be invaded, and does not employ the "clear and present danger" test, which is necessary. Though the legislature may decide in the first place what is necessary its decision is not final when liberty of conscience, of worship of Almighty God, of speech and of the person is denied. In the end this Court must decide whether there is justification for the abridgment and whether there is a *clear and present danger* which must be found to exist. The rule was well expressed in *Herndon* v. *Lowry*, 301 U. S. 242, when this court said:

> "The power of a state to abridge freedom of *worship, conscience*, speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution." [Italicized words added.]

The doctrine of supremacy of the legislature has been

considered and condemned by one of the most eminent advocates and statesmen in history of these United States. Mr. Webster in the case of *Dartmouth College* v. *Woodward* (4 Wheat. 518, 581-582) said: "Every thing which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures, in all possible forms, would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country." See *Webster's Works.*

This question has also been dealt with in *older days* by a well known New York judge in the case of *Taylor* v. *Porter,* 4 Hill (N. Y.) 140, 143, where it is said: "Statute law is in the highest sense the law of the land; and the legislative department, created for the very purpose of declaring from time to time what shall be the law, possesses ample powers to make, modify, and repeal, as public policy or the public need shall demand. Such being the case, the question presents itself whether anything may be made the law of the land, or may become due process of law, which the legislature under proper forms may see fit to enact? To solve this question we have only to consider for a moment the purpose of the clause under examination. That purpose, as is apparent, was individual protection by limitation upon power; and any construction which would leave with the legislature this unbridled authority, as has been well said by an eminent jurist, 'would render the restriction abso-

lately nugatory, and turn this part of the Constitution into mere nonsense.' The people would be made to say to the two Houses, You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of the rights or privileges of a citizen unless you pass a statute for that purpose. In other words, you shall not do the wrong unless you choose to do it."

H

Although all effective means of inducing political change through "democratic processes" is left open by means of appeal to the forum of public opinion and legislative assemblies there is still not sufficient ground to relieve this Court of its responsibilities under the Constitution to determine the constitutional question presented.

The duties of this Court are well described by its former Chief Justice Marshall in the case of *Cohens* v. *Virginia* (1821), 6 Wheat. 264, 404, in these words:

> **"The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously perform our duty."**

This same attitude was well expressed by the Supreme Court of Colorado in *Walker* v. *Bedford*, 93 Colo. 400, 408, as follows:

"We pronounce as the most certain of law that there has never been, and can never be, an emergency confronting the state that will warrant the servants of the Constitution waiving so much as a word of its provisions. . . . No specie of reasoning, no ingenuity of construction, no degree of emergency, can persuade us that the Constitution is without potency or dissuade us from performing our duty as its sworn officers."

To the contrary of the above, however, Mr. Justice Frankfurter, in the *Gobitis* case, supra, at page 598 says:

"It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncrasies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it."

In this connection the rule is announced by this Court in *Schneider* v. *State*, supra, in the following language:

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, THE COURTS SHOULD BE ASTUTE TO EXAMINE THE EF-

> FECT OF THE CHALLENGED LEGISLATION. . . . AND SO, AS CASES ARISE, THE DELICATE AND DIFFICULT TASK FALLS UPON THE COURTS to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights." [Capitalization added]

The final duty falls upon the Supreme Court of the United States to settle the controversy brought before it, as in the *Gobitis* case; and it was entirely improper and contrary to the settled weight of authority to shift responsibility back to the school boards and the legislature, because *this Court is the last bulwark of liberty in this country.* In effect the *Gobitis* decision left the "poor and weak" and helpless minority known as Jehovah's witnesses at the mercy of public opinion and in the same manner as did Pontius Pilate when confronted with the responsibility of deciding what should be done concerning Jesus of Nazareth when before him *falsely* charged with the crime of sedition.

One of many basic fallacies of the *Gobitis* decision is that the Court entirely overlooked the fact that the statutes and regulation, though valid on their face, are unconstitutional as *construed and applied.* Mr. Justice Frankfurter assumes that if the statute is valid on its face, it is beyond the power of the Court to weigh the facts and circumstances to determine whether or not fundamental personal rights have been denied. This is contrary to decisions of this Court holding that validity of the statute depends on how it is *construed and applied.* In *Concordia Fire Ins. Co.* v. *Illinois,* 292 U.S. 535, 545, this Court said:

> "Whether a statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another."

Likewise, this Court, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-374, added:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

In the *Gobitis* decision this Court *abdicated its duties* with respect to protection of the sacred rights of conscience of the individual and shifted such responsibilities to the school board, permitting such board's decision to be supreme. In justification of that step this Court announced the *new rule* that the citizen, regardless of how unpopular, oppressed and persecuted, must trust in the *majority* popular will to correct "foolish legislation" which admittedly violates the constitutional liberties of the people declared in the Bill of Rights. Thus this Court held that its only duty is to keep open the process of correcting such legislation by appeal to the popular open forum, the legislature, etc. This Court said that were its decision on this question given *in favor* of Jehovah's witnesses that would make it the *school board* for the nation. In effect the Court held that safeguarding "freedom of conscience" is entirely a local problem with which this Court is not concerned.

The new theory of requiring appeal through democratic processes to the *people* (i.e., majority rule or mob rule), as the only way to correct "silly" legislation violating the Bill of Rights, is judicial repeal of the Constitution itself. This returns small minorities and ALL non-majority persons to the same condition they were in prior to the American Revolution. If the citizen's exercise of his fundamental

rights depends on popular will, approval or consent of the *majority*, then such rights will change with the whim of every majority in power and the Constitution be not worth the paper it is written on.

When this Court refused to make itself "the school board for the country" by protecting the constitutional rights of Jehovah's witnesses and thus shifted the great burden and responsibility to the school boards, Jehovah's witnesses went along with this decision at every school term following June 3, 1940. When wholesale expulsions began throughout the nation they immediately appealed and have since continued to appeal to the local school boards to have the "foolish legislation" provide an exemption for those who had conscientious objection to the flag salute. The answer to this plea in every one of thousands of cases was that the Supreme Court of the United States has ruled that Jehovah's witnesses must salute the flag in order to enjoy the benefit of education. This nation-wide fight by Jehovah's witnesses during the last two and a half years in the "forum of public opinion" has not resulted in "abandonment of foolish legislation", has not been "a training in liberty" and has not served "to vindicate the self-confidence of a free people", but has unquestionably resulted in the very antithesis of these desirable ends.

It is a well known fact that minorities, especially when unpopular, have just about as little chance for repeal of *silly legislation* before the open forum of public opinion and some legislative bodies as a refrigerator salesman has to find buyers of his ice boxes in the land of the Eskimo. To offer minorities this sort of protection is like handing a straw to a drowning man to rescue himself!

The error of the suggestion to appeal to the *popular forum* is proved by the fact that thousands upon thousands of Jehovah's witnesses have been refused a fair hearing on their petitions to have the regulation amended so as to permit their children to attend school and be excused from

ceremonies of this character. All of said petitions have been denied annually under the "authority" of the *Gobitis* decision, since which case children have been denied education and parents their constitutional rights in all 48 states of the Union.

As a further illustration of how ineffective the suggestion of appeal by minorities to *popular rule* for relief, attention is called to the Negro situation in the South under the Jim Crow law and other customs prevailing there. In such situations, as above, where prejudice against small minorities prevents appeal to political processes to correct the evil, the minorities are thus left to the arbitrary will of the majority. This Court in such circumstances as these has the duty to scrutinize legislation which violates the rights of conscience regardless of whether or not the Court will become the *school board* for the nation. It is suggested that Jehovah's witnesses' experience with the school boards of the nation prove that such boards need a short lesson in democracy and "training in liberty" by being ordered to reinstate children of Jehovah's witnesses. Such would teach such stiff boards how to desist from searing the young conscience by applying the "hot poker" of oppression to innocent, liberty-loving little children who have sincere and valid objections to the compulsory flag salute.

It is respectfully urged that the decision in the *Gobitis* case made the school boards the *Supreme Court* of the nation as far as the compulsory flag-salute controversy is concerned. The net result is that the Court has allowed every individual principal, teacher, and school board member having anything to do with the controversy to become a little czar unto himself, and in every case to decide what seems right in the particular circumstances. In thus leaving this important national problem up to the school boards, to determine locally the question of freedom of conscience, chaos and confusion have resulted. Such a rule allows national disunity and works to the destruction of cohesion

because it permits each school district to establish a different rule which can easily change and vary with the rising of every sun. This rule announced in the *Gobitis* decision thus subordinates the Constitution to the rules of the school boards. Such nullifies the Constitution.

I

Freedom of speech is impaired and abridged by the compulsory flag-salute ceremony when children are expelled from school for refusal to salute the flag.

The requirement by law of the compulsory flag salute, contrary to the conscience of the individual, is similar, if not identical, to the ancient *test oaths* required as condition precedent to enjoyment of constitutional rights. In *Ex parte Garland*, 4 Wall. 333, 377 (1867), it was held that the requirement of special test oath as condition precedent to an attorney being admitted to practice law or to the bar of the local Federal court, was unconstitutional. Similarly, the compelling of the salute of the flag as a condition precedent to enjoyment of facilities of free public schools was held to be unconstitutional in the States of Kansas and Washington. (*State* v. *Smith and Griggsby*, supra; *Bolling* v. *Superior Court*, supra) See, also, *Cummings* v. *Missouri*, 4 Wall. 277, 323 (1867); *Kennedy* v. *Moscow*, 39 F. Supp. 26 (1941), and *Reid* v. *Brookville*, 39 F. Supp. 30 (1941), in which two last named cases the requirement that one salute the American flag and give the pledge of allegiance as conditions precedent to exercise of constitutional rights of freedom of the press was declared to be unconstitutional and void. In the *Reid* v. *Brookville* case, supra, an ordinance of the Pennsylvania city of Monessen was involved; in the other case, an ordinance of the City of Moscow, Idaho. See, also, special concurring opinion of Judge Chapman in the Supreme Court of Florida, in *State ex rel. Wilson and Shadman* v. *Russell*, 146 Fla. 539, 1 So. 2d 569.

Stromberg v. *California*, 283 U.S. 359, is also in point here. Yetta Stromberg, an American-born girl of Russian parentage, a supervisor of a summer camp in the foothills of the San Bernardino Mountains for children between ten and fifteen years old, was nineteen and a member of the Young Communist League, which was affiliated with the Communist Party. She led the children in their daily study of history and economics, stressing class consciousness and the doctrine that "the workers of the world are of one blood and brothers all." The camp library contained a number of books and pamphlets, many of them hers; and quotations from these by the state court in affirming her conviction abundantly demonstrated that they contained incitements to violence and to "armed uprisings," teaching "the indispensability of a desperate, bloody, destructive war as the immediate task of the coming action". It was agreed, however, that none of these books or pamphlets were used in the teaching at the camp. She testified that nothing in the library, and particularly none of the exhibits containing radical Communist propaganda, was in any way brought to the attention of any child or any other person, and that no word of violence or anarchism or sedition was employed in her teaching of the children. There was no evidence to the contrary.

The only charge against Yetta Stromberg concerned a ceremony which began every camp day. Under her direction a red flag was run up bearing a hammer and sickle—a camp-made reproduction of the flag of Soviet Russia and the Communist Party in this country. During this daily flag-raising, the children stood at salute by their cots and recited in unison: "I pledge allegiance to the workers' red flag and to the cause for which it stands, one aim throughout our lives, freedom for the working class."

She was arrested under a statute, California Penal Code, Section 403a, which prohibited and made a felony the display of a red flag in a public assembly "as a sign, symbol

or emblem of opposition to organized government, or as an invitation or stimulus to anarchistic action, or as an aid to propaganda that is of a seditious character."

. There is no distinction, we submit, between the *Stromberg* case, supra, and the case at bar. When the right of *free speech* is exercised the person says something, or performs an act, a gesture symbolic of speech, to communicate to others an idea. Such act or oral utterance used to communicate such idea may be violative of a statute, as was claimed in the *Stromberg* case, supra. Or, as in the case at bar, the person's electing to *withhold* a gesture (or oral utterance) by means of which a certain state of mind is openly manifested or declared to others, may be claimed to be violative of a statute or school-board regulation. In the case here, appellees are compelled, under threat of severe penalty, to cause their children to communicate or "say" something which the children's and the parents' sincere and conscientious understanding of the CREATOR'S written Law convinces them to be morally wrong *for them* to "say", and the saying of which *by them* in the manner required by the Regulation would result in their "eternal destruction" at the hand of their Maker, JEHOVAH GOD.

As in the *Stromberg* case, supra, the prohibition of the showing of a red flag "as a sign, symbol or emblem of opposition to organized government," could be held "an unwarranted limitation of the right of free speech", so here the compelled flag salute is equally an interference with the right of free speech. Compelling one to communicate by means of oral utterance or by gesture, under penalty, is quite as clear an invasion of the right of free speech as the attempt by law to *prevent* expression or communication by word or sign, such as use of the "red flag" in the *Stromberg* case, supra. Refusal of appellees' children to salute a flag does not present a *clear and present* danger of the character equal to that which the State claimed to be seeking to avert in the *Stromberg* case. There the court held

that the persistent practice of saluting the Communist emblem could not be prohibited by statute. If the right is given or safeguarded by the Constitution to salute the flag of a foreign power whose principles are at enmity to the principles of the United States Constitution, then with greater force of reason the Constitution of the United States shields the poor and helpless child who, bearing no allegiance to a foreign power, refuses for conscience' sake to salute the national flag.

The case of *Herndon* v. *Lowry*, 301 U. S. 242, is also in point. There a conviction of one who advocated overthrow of the government under an "insurrection statute" was set aside on the ground that it abridged his right of freedom of speech. This Court's holding in that case was referred to by Judge Parker of the court below (R. 52) thus:

> "Religious freedom is no less sacred or important to the future of the Republic than freedom of speech; and if speech tending to the overthrow of the government but not constituting a clear and present danger may not be forbidden because of the guaranty of free speech, it is difficult to see how it can be held that conscientious scruples against giving a flag salute must give way to an educational policy having only indirect relation, at most, to the public safety. Surely, it cannot be that the nation is endangered more by the refusal of school children, for religious reasons, to salute the flag than by the advocacy on the part of grown men of doctrines which tend towards the overthrow of the government."

Appellants claim that the purpose of saluting the flag is to 'instill in the children patriotism and love of country'. But why limit that compulsory rule to teachers and pupils of the public schools? Why not require that same ceremony in *all* the schools? Why not apply the same rule to all officials

of the Nation and State, from the President and the members of Congress down to the very least and humblest citizen? The general answer would be that *the enforcement of such a rule is ridiculous and nonsensical.* The opinion of the United States Circuit Court of Appeals (*Gobitis* case, supra) quotes appropriately the following:

> "Another form that false patriotism frequently takes is so-called 'Flag-worship'—blind and excessive adulation of the Flag as an emblem or image,—superpunctiliousness and meticulosity in displaying and saluting the Flag—without intelligent and sincere understanding and appreciation of the ideals and institutions it symbolizes. This, of course, is but a form of idolatry—a sort of 'glorified idolatry', so to speak. When patriotism assumes this form it is nonsensical and makes the 'patriot' ridiculous. (Moss, *The Flag of the United States, Its History and Symbolism*, Chap. 14, pp. 85-86.)"

We have, of course, no quarrel with broad statements like the foregoing insofar as they are aimed to emphasize that maintenance of loyalty and preservation of morals are of highest importance to the public welfare. No one disputes that. We submit, however, that such a premise falls far short of supporting the conclusion that some courts have sought to draw from it: that government can accomplish this proper purpose by *forcing* citizens, under severe penalty and against their will and conscience, to salute a particular symbol in a particular way. The crux of the whole matter relates to method. If it be constitutional to prescribe a salute and pledge to the national flag on the part of school children and to *force* compliance upon the ground that to do so may promote loyalty, then why, it may be fairly asked, could not the legislature choose to require a tribute of respect to some other symbol? In many countries, a person rather than a flag is considered the most appropriate

symbol of national unity and morale—usually the chief-of-state. In Germany, it is the Fuehrer rather than the swastika or the German flag that is the usual object of a gesture of loyalty; in Italy it is the same with the Duce, and in Russia, with Stalin. Would it, upon the reasoning just referred to, be constitutional to require school children to salute a portrait of a national hero—Washington, Lincoln or Jefferson—even if objecting children did not put their refusal upon religious grounds? Under like circumstances, would it be constitutional to require such a salute to a picture of the President during his term, whoever he might be?

It may be said that a portrait of a man differs from the flag in that the flag is merely an abstract symbol. Whether such a distinction is valid may be tested by inquiring whether it would be constitutional for the legislature to require *all persons, young* and old (except infants, the infirm and the sick), to salute the flag at stated intervals.

Specifically, let us suppose that a statute of West Virginia should require the whole adult population to give this particular form of salute once a week at a time to be fixed by the Governor or other executive agency. Let us suppose that many citizens refused to comply, but none on religious grounds. Some would presumably refuse on grounds of mere inconvenience; others might object to the particular form of the salute as too much resembling the Nazi or Fascist salutes. Still others would doubtless invoke their "liberty" as American citizens without further specifying what they had in mind. Let us suppose that these objectors were arrested and put on trial as to whether they should suffer penalties for their non-compliance and that they were to plead the unconstitutionality of the legislation as depriving them of their "liberty" under the Fourteenth Amendment. Would this plea be good?

We submit that the plea would be good and that such legislation would be unconstitutional. The requirement of such

a ritual is clearly alien to American institutions. It would be an intolerable invasion of individual liberties. Because it is inherent in the very nature of Americans to resent unnecessary assertions of authority, such a measure would not further the end of promoting loyalty and strengthening morale, but would have precisely the opposite effect.

The number of ways available for the promotion of loyalty, without resort to compulsory ritual, is indefinitely large. See address of United States Supreme Court Justice Jackson before the Texas Bar Association at San Antonio, as reported in the New York *Times* July 4, 1942, and in the *Texas Bar Journal* August 1942, Vol. 5, No. 8, pp. 255, 256.[7]

In *Thornhill* v. *Alabama*, 310 U. S. 88, 95, 102, in 1940, Mr. Justice Murphy, speaking for the Court, concerning the application of an Alabama statute, directed at labor agitation (as the Regulation here involved is directed at Jehovah's witnesses in providing "that refusal to salute the Flag be regarded as an act of insubordination"), said:

> "Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. . . .
>
> "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period. In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."

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[7] See APPENDIX A, page 91, infra, this brief.

Free speech is essential to freedom of discussion. In this connection see consideration of this principle as related to the withholding and the giving of the required salute to the flag, appearing herein with regard to issues settled in *Stromberg* v. *California*, supra, pages 65-67.

J

Approximately three years' retrospect concerning the Gobitis case and events following said decision to date.[5]

Immediately following delivery of the *Gobitis* opinion on June 3, 1940, a nation-wide campaign of newspaper publicity and idle gossip was launched by enemies of Jehovah's witnesses, *falsely* accusing them of being 'against the flag and government', solely because they refuse to salute any flag, including the American flag, for *conscience'* sake. That opinion was like a lighted match applied to a field of dried grass. Prejudice created by unfavorable newspaper publicity flamed into open violence. Widespread mob attacks resulted immediately against Jehovah's witnesses. For more than two years, in thousands of communities throughout this land, certain religious elements or "would-be" patriotic elements have led men controlled neither by law nor reason to assault thousands of Jehovah's witnesses, men, women and children; destroyed their property; drove them from their homes; burned their houses, places of worship, furniture, books and money; tied groups of them together and forced castor oil in large quantity down their throats; herded them like beasts along hot, dusty roads and railroad rights-of-way in many places; dragged them along the main streets of the city by a rope around their necks and strung up; and committed numerous other deeds of

[5] A large portion of the information appearing under this proposition is taken verbatim from the article "Recent Limitations Upon Religious Liberty" (*American Political Science Review*, December, 1942) by Victor W. Rotnem, based on thousands of complaints and affidavits filed with the Federal Department of Justice, Civil Liberties Unit (headed by Mr. Rotnem).

violence and wickedness against them without a cause, and continue so to do to this day without interference from *the law*. Public officials, influenced by well-known religionists, broke into homes of private citizens, Jehovah's witnesses, kidnaped and carried them from one state to another, and broke up their private Bible-study assemblies.

Thousands of children have been expelled from school and great numbers prosecuted as delinquents, many convicted and ordered to be taken from parents. Hundreds of parents have been threatened with prosecution for the alleged crime of contributing to delinquency and truancy of their children and many convicted—all because they have taught them the Bible and the children have humbly obeyed God's commands.

Thus it is manifest that the *Gobitis* decision against *freedom of conscience* has ever been and now is an instrument for evil in the hands of superpatriots and pseudo-patriots.

Today hundreds of Jehovah's witnesses are being prosecuted under state laws enacted during March 1942 in Mississippi and in July 1942 in Louisiana, which prohibit possession and distribution of literature explaining the reasons why Jehovah's witnesses cannot salute a flag. The punishment in Mississippi is confinement in the penitentiary and is mandatory for the duration of the war, not to exceed ten years. In Mississippi many cases have been appealed to the state supreme court. Recently three of the several cases appealed have been decided adversely to Jehovah's witnesses sustaining the conviction and mandatory ten-year sentences. The cases are being appealed to this Court.

The State of Arkansas has followed suit by rushing through its legislature a statute like that of Mississippi, aimed directly at Jehovah's witnesses. This is another direct result of the *Gobitis* decision.

Between June 12 and June 20, 1940, hundreds of attacks upon Jehovah's witnesses were reported to the Federal

Department of Justice. Since 1940 many thousands of such cases have been reported to the department. Several of these cases were of such violence that it was deemed advisable to have the Federal Bureau of Investigation look into them. At Kennebunk, Maine, the Kingdom Hall of Jehovah's witnesses was destroyed by fire. At Litchfield, Illinois, practically an entire town mobbed a company of some sixty of Jehovah's witnesses who were peacefully going from house to house tendering to residents printed literature explaining the Bible, and it was necessary to call on the State Troopers to protect the victims of the mob numbering thousands. At Connersville, Indiana, several of Jehovah's witnesses were falsely charged with riotous conspiracy, their attorney and his wife were mobbed and brutally beaten and severely injured and driven out of town, as were also several other friends of the accused who attended the trial. At Jackson, Mississippi, members of a veterans' organization, led by an individual claiming the rank of major, forcibly removed a number of Jehovah's witnesses and their trailer homes from that city and state. These are but specimens of the thousands of other instances of violence equal or worse in scope. Three instances of such vigilantism led by state or municipal officers caused the Department of Justice to seek indictments against the officers for violation of the Civil Rights Act, Sec. 52, T. 18, U. S. C. According to reports from the department the respective grand juries refused to indict. Then an information was filed in the worst of those three assaults in which a chief of police and deputy sheriff had forced a group of Jehovah's witnesses to drink large doses of castor oil and had paraded the victims through the streets of Richwood, *West Virginia*, tied together with police department rope. The trial of this outrage resulted in a speedy conviction. Defendant Catlette, deputy sheriff aforesaid, appealed. The Circuit Court of Appeals for the Fourth Circuit affirmed. *Catlette* v. *United States* (January 6, 1943) .... F. 2d ....

A very few instances of violence have been the subject of other judicial review and opinion of the courts. However, a few instances have received attention: See *City of Gaffney* (S. C.) v. *Putnam*, 15 S. E. 2d 130; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568; *Lynch* v. *City of Muskogee* (Okla.), 47 F. Supp. 589; *McKee* v. *State* (Okla. Criminal Court of Appeals, decided Dec. 9, 1942) 132 P. 2d 173. See Jurisdictional Statement in No. 566, October Term 1941, styled *Trent* v. *Hunt*, and Jurisdictional Statement in No. 567, October Term 1941, styled *Bevins* v. *Prindable*.

Here we invite the Court's attention to the statement of United States Solicitor General Francis Biddle, in his address of June 16, 1940, broadcast over a coast-to-coast network of the National Broadcasting Company, concerning mob violence practiced against Jehovah's witnesses:

> "*. . . Jehovah's witnesses have been repeatedly set upon and beaten. They had committed no crime; but the mob adjudged they had, and meted out mob punishment. The Attorney General has ordered an immediate investigation of these outrages.*
>
> "The people must be alert and watchful, and above all cool and sane. Since mob violence will make the government's task infinitely more difficult, it will not be tolerated. We shall not defeat the Nazi evil by emulating its methods."—Excerpt from mimeograph copy of address of Solicitor General Biddle furnished by him to appellees' counsel.[9]

[9] See also publications of the American Civil Liberties Union entitled "The Persecution of Jehovah's witnesses", published January 1941; booklet entitled "Liberty's National Emergency—The Story of Civil Liberty in The Crisis Year 1940-1941", published in June 1941; and "Jehovah's witnesses and the War", published in January 1943. See also "The Case of Jehovah's witnesses" (John Haynes Holmes), *The Christian Century* (Chicago) for July 17, 1940; "Armageddon, Inc." (Stanley High), *The Saturday Evening Post* (Philadelphia) for September 14, 1940; "Jehovah's witnesses, Who Refuse to Salute the Flag," *Life* magazine (Chicago) for August 12, 1940; "Fifth Column Jitters" (Charles R. Walker), *McCall's* magazine (New York) for November 1940; "Jehovah's 50,000 witnesses" (H. Rutledge Southworth), *The Nation* (New York) for August 10, 1940;

[*Continued on next page*]

Jehovah's witnesses assembled in national convention in July, 1940, such assembly being held simultaneously in twenty cities of some fifteen states, all convention halls being linked by telephone lines to the key assembly at Detroit, Michigan. At the urgent request of the Department of Justice, through the United States Attorneys, local law enforcement officers were induced to give those conventions adequate protection, so that no violence attended. In this connection, it should be noted also that persecution of Jehovah's witnesses is frequently a small-town and rural-community phenomenon, whereas their conventions are held in the larger cities of the country.

In September 1942, Jehovah's witnesses assembled in 52 cities in the United States, with Cleveland, Ohio, as the key assembly point and the other cities linked by telephone lines. In three of the cities *mobocracy* "took over" and the "four freedoms" were *blitzkrieged*. At Little Rock, Arkansas; Springfield, Illinois, and Klamath Falls, Oregon, demonized mobs overran these three cities unhindered by the duly elected officers of the municipalities; property was destroyed, cars and trucks overturned, telephone lines cut, assembly halls damaged, bonfires of Bible literature crackled and blazed in the streets; crowds of men, women and children assailed; children stoned, teeth knocked out, noses broken; Christian women foully cursed, brutally beaten and then robbed; Christian men feloniously assaulted, clubbed, slugged with blackjacks, knifed and shot; victims left bleeding, clothing of some completely torn off, others left lying

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"Peddlers of Paradise" (Jerome Beatty), *The American Magazine* for November 1940; "Rutherfordism v. Catholicism" (Thomas Emmett Coll), *Our Sunday Visitor* (Huntington, Indiana) for August 4, 1940; "A Current Problem in Freedom of Speech and of Religion" (Joseph T. Tinnelly), *St. John's Law Review* (New York) for November 1941, Vol. XVI, No. 1; "The Strange Jehovahs" (Edgar W. Waybright), *Liberty* (Washington, D.C.) for Second Quarter 1942, Vol. 37, Number 2; "I Admire the Jehovah witnesses" (John S. Kennedy), *Columbia* (New Haven, Conn., national organ of Knights of Columbus and world's largest Catholic magazine) for January 1943.

unconscious in bloodsoaked remnants of their apparel; bruised and beaten bodies cast off the road to lie for hours unattended and indeed left for dead—all without so much as a "so sorry". And this was provoked because of misrepresentation of Jehovah's witnesses and because of their conscientious refusal, in obedience to God's Law (Exodus 20: 3-6) to salute any flag when commanded by the mobsters to do so. Not one of such criminal mobsters was arrested or prosecuted.

In the two years following the *Gobitis* decision, it can be authoritatively stated, the files of the Department of Justice reflect an uninterrupted record of similar violence and persecution of Jehovah's witnesses like above cases. Almost without exception, the flag and refusal to give the salute can be found as the percussion cap that set off these acts.

In Oklahoma, children of Jehovah's witnesses expelled from the Woods County Public Schools for refusal to salute the flag were being tutored by an ex-school teacher in her home. She now has been convicted of failing to require the flag salute in her private classes although she had formulated a different exercise, consisting of a pledge of allegiance to Almighty God and expressing respect for the flag. Her case is pending on appeal with three similar cases against parents under same statute in the Oklahoma Criminal Court of Appeals: *Carter-Mort* v. *State*, *Pendley* v. *State*, *Zimmerman and McCurley* v. *State*, *Partain* v. *State*.

In many states in addition to Oklahoma and West Virginia, the flag has been used in a manner bordering on immorality by mobs which have therewith baited groups of Jehovah's witnesses. Mayors' courts and justices of the peace courts in nearly every state of the Union have entertained evidence relative to the refusal of Jehovah's witnesses to compromise their conscientious convictions about flag saluting as an excuse to convict them on charges of breach of the peace, inciting to riot, violating of peddling ordinances,

and other misdemeanors. Few such decisions, however, have been honored on appeal to courts of record, resultant expense of prosecuting which appeals, though exceedingly great in the aggregate, Jehovah's witnesses have borne out of their very limited resources.

This ugly picture of the years following the *Gobitis* decision is an eloquent argument in support of the minority contention of Mr. Justice Stone, and of the position taken in June 1942 by Justices Murphy, Douglas and Black that they "wrongly decided" the *Gobitis* case in 1940. The placing of symbolic exercises of comparatively insignificant constructive value on a higher plane than *freedom of conscience* has made this symbol an instrument of oppression of a God-fearing, law-abiding minority comprising courageous, home-loving, industrious, upright citizens. *The flag has been besmirched and degraded by its misuse* to deny the very freedoms it is intended to represent, the freedoms which themselves best engender a healthy "cohesive" respect for national institutions. In short, public health, safety, morals and welfare have NOT been fortified by the compulsory flag-salute laws and regulations. Indeed, the unhappy result, nation-wide, has been quite the contrary.

The vigor of constitutional guarantees such as freedom of worship and freedom of speech, on which respect for flag and country must depend, flows from their ever-renewed public recognition and observance. How much more effective an instrument of patriotic education it would be if the flag-salute ceremony itself were made a practical daily lesson in a fundamental liberty—as judicially and judiciously suggested by the present Chief Judge of the highest court of New York State—a liberty which is one of the four great freedoms for which inhabitants of this land now fight!

In that case (*People* v. *Sandstrom*, 279 N. Y. 523, 18 N. E. 2d 840, Jan. 17, 1939) Judge Lehman said:

"An act of disrespect to the flag by child or parent

> may be punished, but there is no disrespect to the flag in refusal to salute the flag by a child who has been taught that it is a moral wrong to show respect in the form of a salute. . . . *The flag salute would lose no dignity or worth if she were permitted to refrain from joining in it. On the contrary, that would be an impressive lesson for her and the other children that the flag stands for absolute freedom of conscience* . . .
> [Italics added]
>
> "The salute of the flag is a gesture of love and respect—fine when there is real love and respect back of the gesture. The flag is dishonored by a salute by a child in reluctant and terrified obedience to a command of secular authority which clashes with the dictates of conscience. The flag 'cherished by all our hearts' should not be soiled by the tears of a little child. The Constitution does not permit, and the Legislature never intended, that the flag should be so soiled and dishonored."

To this same effect, see *In re Latrecchia*, 128 N. J. L. 472, 26 A. 2d 881, decided by the New Jersey Supreme Court June 30, 1942.

Out of all the resistance by Jehovah's witnesses to the flooding reign of terror has emerged a pile of immovable "stones" as a memorial, establishing confidence in the judicial system of America. In spite of the hope expressed by Justice Frankfurter about democratic processes and the forum of public opinion, it should be noted that the only relief given against this storm of violence and persecution of men, women and children because of conscience' sake, was by brave and noble judges who dared to face boldly the majority rule and expound the Constitution!

It is well to mention such gems of democracy for consideration here. The cases are directly in point here and prove the fallacy of the *Gobitis* decision.[10]

There are a number of other cases of lower trial courts which are unreported. In every instance the *Gobitis* case was not extended any further than to allow expulsion of children from school. Some courts defiantly refused to follow the *Gobitis* decision outright, using the State Constitution as a shield of protection of the cherished right against the *Gobitis* decision.

An examination of the various law review publications and legal periodicals of the various universities and associations establishes the fact that that section of the "public forum" disapproves the *Gobitis* decision. Their words establish the fact that such decision will not work in a democracy, that it is unsound and unconstitutional. A list of some of the periodicals is given herewith in footnote.[11]

In the forum of opinion the public press has been waging vigorous and continuous war on the majority opinion in the *Gobitis* case. Although the number protesting has been great, the legislative bodies and school boards have not yielded to the newspapers' influence upon such forum

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[10] *In re Jones*, 24 N. Y. S. 2d 10, 175 Misc. 451;
In re Reed, 28 N. Y. S. 2d 92, 262 A. D. 814;
In re Lefebvre ..... N. H. ....., 20 A. 2d 185;
In re Latrecchia, 128 N. J. L. 472, 26 A. 2d 881;
State v. Smith and Griggsby, 155 Kans. 588, 127 P. 2d 518;
People v. Chiafreddo, ... Ill. ....., 44 N. E. 2d 888;
Barnette v. W. Va. State Board of Education et al., 47 F. Supp. 251;
People v. Sandstrom, 279 N. Y. 523, 18 N. E. 2d 840;
Commonwealth v. Johnson et al., 308 Mass. 370, 35 N. E. 2d 801;
Bolling v. Superior Ct for Clallam County, ... Wash. ....., ... P. ....., decided Jan. 29, 1943 by Supreme Court of Washington.

[11] 1943: 29 Va. Law Rev., January, 440-459.
1942: Yale Law Journal, December; 17 Indiana Law Journal 555.
1941: 1 Bill of Rights Rev. 267; 1 Bill of Rights Rev. No. 1 (Supplement); 6 Missouri Law Rev. 106; Fennell, "The Reconstructed Court" and Religious Freedom; The Gobitis case in Retrospect (1941) 19 New York University Law Quarterly Rev.
1940: Balter, "Freedom of Religion Interpreted in Two Supreme Court Decisions", 15 California S. B. J. 161; 26 Cornell Law Quarterly 127; 29 Georgetown Law Journal 112; 9 Internat'l Jurid. Assn. Bulletin 1;

[*Continued on next page*]

by permitting the children to return to school. A list of some of the newspapers is given in another footnote.[12]

[NOTE 11 *continued from preceding page*]

39 Michigan Law Review 149; 18 New York University Law Quarterly Rev. 124; 15 St. John's Law Rev. 95; 14 So. Calif. L. Rev. 56, 57; 14 So. Calif. L. Rev. 73; 14 Univ. of Cincinnati L. Rev. 570; 4 Univ. of Detroit Law Journal 38; 15 Washington Law Rev. 265; Cushman, "Constitutional Law in 1939-1940", 35 Amer. Pol. Sci. Rev. 250, 269-271; Konoviz, "The Case of the Eight Divinity Students", 1 Bill of Rights Rev. 198, 204-205. See, also, *Consolation* (Brooklyn, N. Y.) July 24, 1940, pp. 7-8.

[12] Newspapers of the United States that have published editorials differing from the majority opinion of the United States Supreme Court number several hundred, of which a few are the following:

Asbury Park (N. J.) *Press;* Altoona (Pa.) *Mirror;* Arvin (Calif.) *Tiller;* Ann Arbor (Mich.) *News;* Arlington (Kans.) *Enterprise;* Auburn (N. Y.) *Citizen-Advertiser;* Akron (Ohio) *Beacon Journal;* *The American Freeman*, Girard, Kansas; *The American Guardian*, Oklahoma City, Okla.; *The American Protestant*, Washington, D. C.; Bridgeport (Conn.) *Post;* Boston (Mass.) *Post;* Boston (Mass.) *Herald;* Birmingham (Ala.) *Age-Herald* and *News;* Baltimore (Md.) *Sun;* Boston (Mass.) *Transcript;* Bayonne (N. J.) *Times;* Brockton (Mass.) *Enterprise;* Butte *Montana Standard;* Buffalo (N. Y.) *Times;* Bismarck (N. Dak.) *Tribune;* Benton Harbor (Mich.) *News-Palladium;* Sonora (Calif.) *Banner and News;* Buffalo (N. Y.) *Courier-Express;* Chicago (Ill.) *Tribune;* Chicago (Ill.) *News;* *Christian Century*, Chicago, Ill.; *The Covenant Weekly*, Chicago, Ill., Cincinnati (Ohio) *Enquirer;* Cincinnati (Ohio) *Post;* Columbus (Ohio) *Citizen;* Columbus (Ohio) *State Journal;* Camden (N. J.) *Courier-Post;* Cleveland (Ohio) *News;* Cleveland (Ohio) *Plaindealer;* Cleveland (Ohio) *Press;* *Svenska Amerikanaren Tribunen*, Chicago, Ill.

Dallas (Texas) *Dispatch-Journal;* *Daily News*, Wellington Kans.; Denver (Colo.) *Post;* Decatur (Ill.) *Herald;* Detroit (Mich.) *Times;* Duluth (Minn.) *Herald;* Des Moines (Iowa) *Register;* Dayton (Ohio) *News;* Detroit (Mich.) *Free Press;* *The Daily Republic*, Mitchell, S. Dak.; Easton (Pa.) *Herald;* Fort Myers (Fla.) *News-Press;* Fergus Falls (Minn.) *Journal;* Frederick (Okla.) *Press;* Fort Worth (Texas) *Star-Telegram;* Greenfield (Mass.) *Recorder-Gazette;* Greenfield (Mass.) *Shopping News;* Glens Falls (N. Y.) *Times;* Glenwood (Minn.) *Herald;* Great Falls (Mont.) *Tribune;* Hemet (Calif.) *News;* Hollywood (Calif.) *Citizen-News;* Hartford (Conn.) *Courant;* Johnstown (Pa.) *Democrat;* Johnstown (Pa.) *Daily Tribune;* Jacksonville (Fla.) *Journal;* Key West (Fla.) *Citizen;* Kansas City (Mo.) *Journal;* *Simpson's Leader-Times*, Kittanning, Pa.; Louisville (Ky.) *Times;* Louisville (Ky.) *Courier-Journal;* Los Angeles (Calif.) *Examiner;* Los Angeles (Calif.) *News;* *Press-Telegram*, Long Beach, Calif.

Miami (Fla.) *Herald;* Miami (Fla.) *News;* Milwaukee (Wis.) *Sentinel;* Minneapolis (Minn.) *Tribune;* Massillon (Ohio) *Independent;* *The Monitor*, Aurora, Mo., Mobile (Ala.) *Press;* Memphis (Tenn.) *Press-Scimitar;* Bartlesville (Okla.) *Morning-Examiner;* *News Bulletin*, National Education Association, Washington, D. C.; New York *Times;* New York *Herald Tribune;* New York *Daily News;* New York *Post;* New York *Sunday Mirror;* New York *World-Telegram;* *The Nation*, New York city; Newark (N. J.) *News;* Newark (N. J.) *Ledger;* North Adams (Mass.) *Transcript;* New Britain (Conn.) *Herald;* Nashville *Tennessean;* Oakland (Calif.) *Tribune;* Oroville (Calif.) *Mercury-Register.*

American Legion Brief Amicus Curiae

Filing here of a brief *amicus curiae* by The American Legion makes necessary a summary discussion of the horrifying and wholly needless assaults upon Jehovah's witnesses in the name of and by representatives of The American Legion. Although that organization's corporate charter [13] provides, among other things, that—

> "the purpose of this corporation shall be: To promote peace and good will among the peoples of the United States and all the nations of the earth;"

and the preamble to the Legion's Constitution provides that—

> "For God and country we associate ourselves together for the following purposes: To uphold and defend the Constitution of the United States of America; to maintain law and order; . . . to promote peace and goodwill on earth; to safeguard and transmit to posterity the principles of justice, freedom and democracy . . ."

—THE FACTS show that many misguided persons of no understanding or of conscienceless and unscrupulous ilk have shamelessly misused the power and influence of the offices of that corporation entrusted to them, to persecute Jehovah's witnesses. For example, on June 29, 1940, the preamble above mentioned was read by Legionnaires to Jehovah's witnesses who then were violently assaulted, large doses of castor oil forced down their throats and they tied along a large rope and thus driven through the streets of Richwood, West Virginia, because of their conscientious refusal to salute the flag. See *Catlette* v. *United States*, (.... F. 2d ...., CCA-4), decided January 6, 1943.

It was the commander of the Gibsonburg (Ohio) Legion Post who led a mob of 1,000 against a meeting place of

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[13] "An Act to incorporate the American Legion"—Public No. 47, 66th Congress, H. R. 6808; approved September 16, 1919.

Jehovah's witnesses on July 5, 1940, because of their refusal to salute the flag.

On June 19, 1940, at Rockville, Maryland, a Legionnaire, then chief of police of Rockville, and his men directed a mob attack upon the assembly place of Jehovah's witnesses, destroying much property and utterly wrecking the hall.

At Kingfisher, Oklahoma, the local Legion post publicly circulated a handbill accusing Jehovah's witnesses as being of the "fifth column", which purported to be on advice from state and national headquarters. Like advertisements, published in the name of the Legion, appeared frequently during 1940 in many other states.

In a news release published at Jackson, Mississippi, June 29, 1940, Dr. A. C. Bryan, local post commander acting in the name of The American Legion, launched his state-wide *round-up* of Jehovah's witnesses by announcing that 'they were undermining American patriotism' and declared it to be the public duty of every citizen to 'summon the police on sight of any witness'. Bryan further *falsely* published that 'their literature was printed in Germany, aimed at democracy and designed to destroy patriotism'.

In Texas the fires of violence against Jehovah's witnesses were fanned by numerous Legionnaires, including Mark McGee, Fort Worth attorney and former commander of the Fourth Division, Department of Texas, in his public address on June 30, 1940, advising the Legion's state convention that Jehovah's witnesses were "adverse to the ideals of Americanism".

In Illinois, on June 30, 1940, Major Bittinger encouraged violence (which swiftly followed in many Illinois communities) before the convention of the Legion's Illinois department by publicly stating that Jehovah's witnesses "are in the unpatriotic class".

Early in June 1940, by means of a special release sent to newspapers of the nation and all Legion posts, the national commander, Raymond J. Kelly, advocated "summary ac-

tion" against 'unpatriotic elements' and said "those who clamor the loudest about the dangers of losing such liberties bear the most watching". That special release consisted of "two advance reprint pages", in facsimile, of the June (1940) issue of *The National Legionnaire*, Vol. 6, No. 6, containing Kelly's article "The Legion Called the Turn". On June 10, 1940, on behalf of Jehovah's witnesses, J. F. Rutherford, then president of the Watchtower Society, wrote Commander Kelly. The letter speaks for itself. (APPENDIX B, p. 100, *infra*) *Only reply* received was nation-wide "summary action" by Legionnaires against Jehovah's witnesses, like that at Richwood, W. Va.—page 81, supra.

Similarly and simultaneousiy (June 13, 1940) the Legion's national director of its Americanism Commission, at the Roanoke (Va.) Auditorium, in a public address widely circulated by The Associated Press, falsely charged that Jehovah's witnesses preached under pretext of a religious organization that the flag should not be respected. Also for several years that same national director, Homer L. Chaillaux, has mailed to Legion posts and others throughout the nation from Legion's headquarters at Indianapolis hundreds, if not thousands, of letters falsely charging Jehovah's witnesses with preaching "doctrines of disloyalty".

These few of legion examples of what has comprised a continuous nation-wide campaign of hate, covertly waged by officers of the Legion against Jehovah's witnesses because of their worship of Almighty God and conscientious refusal to salute *any* flag, has induced many brutal and violent acts against thousands of harmless, God-fearing men, women and children. In the thousands of cases of mob assaults that have occurred during the past three years in every part of this country against Jehovah's witnesses, more than half can be authoritatively identified directly with representatives of the Legion as the proximate cause or as perpetrated under their actual and boasted leadership.

All this unlawful and illegal course of needless and unrestrained brutality irresistibly reminds one of the gigantic organization of so-called "bullies", *nephilim*, that 'filled the earth with violence' in the days of Noah. (Genesis 6: 4-7; Matthew 24:37-39) The modern-day counterpart of some Legionnaires who have usurped and abused power in this country are *Der Fuehrer's* "Storm Troopers" of Nazi Germany and *Il Duce's* "Black Shirts". Naively, the Legion's national commander (Alvin Owsley) in 1923 declared "that the Fascisti are to Italy what the American Legion is to the United States".[14]

These facts are mentioned to show that here The American Legion is not a non-partisan *amicus curiae*, but in this controversy has an active, un-American, self-serving and biased interest in opposing appellees on the pending legal issues. Therefore argument contained in its brief should be scrutinized, weighed and appraised with a knowledge of these interests, prejudices and historical facts.

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[14] See "The American Legion Takes Orders" (Mayer), *The American Mercury* (Oct. 1939) Vol. 48, No. 190.

TWO

The statutes and regulation in question, providing for compulsory flag-salute ceremony in public schools, when *construed and applied* to facts and circumstances of this case, deny appellees' right to have their children attend the free public schools by requiring the doing of an act contrary to the *due process* and *equal protection* clauses of the Fourteenth Amendment to the United States Constitution.

The right of minor children of appellees to an education in the free public schools of the state of West Virginia is a civil right.

In the instant case, because of the refusal of the children of Jehovah's witnesses and appellees to salute the flag, the school authorities made it impossible for them to attend public school without violating their conscientious convictions, as a result of which they may be subjected to prosecution for violating the compulsory education law. The compulsory flag-saluting requirement thus directly deprives appellees and their children of liberty and equal rights without due process.

The admitted facts establish the proposition that the appellee-parents are not able financially to send their children to private schools and that if the children receive any schooling at all it must be through the public schools, attendance at which is denied them under the statutes and regulation.

The compulsory flag-salute requirement deprives the parents-appellees of liberty to send their children to school without violating their conscientious convictions. The liberty of the parents to direct the education of their children has specifically been recognized by this Court, as pointed out in this brief, pages 43-48, supra.

The right of the parents to have their children receive an education in the free public schools of the state of West Virginia is a civil right, the exercise of which cannot be conditioned upon the doing of an unconstitutional act. See *Terral* v. *Burke Construction Co.*, 257 U. S. 529.

In *People* v. *Stanley*, 81 Colo. 276, 265 P. 610, it was said:

> "The parent has a constitutional right to have his children educated in the public schools of the State. He also has a constitutional right, as we have shown to direct within limits, his children's studies. The school board, though with full power to prescribe the studies, cannot make the surrender of the second a condition of enjoyment of the first. . . . This proposition has been more or less in doubt, but is finally settled in Terral v. Burke Construction Co., 257 U. S. 529."

For other authority that the State cannot thus accord a right or privilege upon condition that the recipient sacrifice a right guaranteed by the United States Constitution, see: *Frost* v. *Railroad Com'n of Calif.*, 271 U. S. 583; *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 507. See *State* v. *Smith*, 155 Kans. 588, 127 P. 2d 518.

Indeed, were this otherwise, all the rights guaranteed by the United States Constitution could be taken away by the States by granting of States' rights or privileges conditioned upon the abandoning of Federal rights. To allow such a subterfuge to deny the appellee-parents and their children their constitutional rights is to violate both the spirit and letter of the Constitution.

Moreover, the regulation which is depriving the children of the right to attend the free public schools without violating their conscientious convictions works injury on the parents-appellees' (and others of Jehovah's witnesses') right to teach their children right principles in harmony with the commandments of Almighty God. One of the liberties guaranteed by the Fourteenth Amendment is that of the parents

to direct the education of their children. This liberty cannot be infringed by making the enjoyment of a civil right, i. e., the right to have their children attend the free public schools, conditioned upon an unconstitutional requirement. See *Pierce* v. *Soc. of Sisters,* supra; *Meyer* v. *Nebraska,* supra.

Unless the parents can afford to send their children to a private school, both the parents and their children will be forced either to forego the right of freedom of worship or to violate the compulsory education law of the state of West Virginia.

Appellees therefore submit that they are being unconstitutionally deprived not only of the right of their children to have and enjoy a free public school education by conditioning the enjoyment of this right on the compliance of said children with an unconstitutional requirement in deprivation of freedom of worship and conscience, but also the right to enjoy such freedom without being subject to prosecution for violation of the compulsory education law.

Conclusion

The compulsory flag salute is not one of the demands of *Caesar* which can be lawfully and reasonably required of Jehovah's witnesses. It does not come within the purview of the proper demands of *Caesar,* i.e., The State, to which the Christian in a covenant with Almighty God is counseled to render what is due. On the contrary the Bible record shows conclusively that Almighty God condemns unto everlasting death any one of His covenant-making servants who willingly submits to the worship of any such image.

The United States was founded as a haven and place of refuge for persons of all creeds to exercise their liberty of conscience without molestation. The Constitution gives the right to salute the flag to those who desire to salute it; it also guarantees the right of Jehovah's witnesses, who con-

scientiously object to saluting the flag, the right to refuse to salute it.

Although the flag-salute ceremony has existed in this country for many years it has never become compulsory until recent years. When the Nazis came to power and began their campaign of conquest, in the Third Reich, as well as in the conquered countries, they instituted the public ceremony of salute to the swastika as an indication of allegiance and loyalty to the Reich. All religions and persons complied except Jehovah's witnesses who have been beaten, killed and torn asunder in the Reich for approximately ten years. When the Japanese began their plans for world domination in collaboration with the Nazis they demanded that all churches and members of Catholic and Protestant denominations do obeisance regularly before church services by bowing to the Japanese flag, sing the Japanese anthem, repeat the oath of allegiance to Japan and give the bow to the East. There all persons and religions complied, including Protestant religionists and the Catholic Hierarchy, which latter now maintains an envoy in Japan. There Jehovah's witnesses alone refused to comply with such unreasonable and God-dishonoring demands and have been killed and persecuted brutally for more than seven years.[15]

The manifest *foolish legislation*, the *compulsory* flag salute, in the United States, is just a scheme of the pseudo-patriots to *"get"* Jehovah's witnesses. The record of God's servant Daniel, who in ancient time was an official of the Medo-Persian government, proves this. He was a man of integrity and honesty in all his dealings. His enemies conspired to "get" him. They wanted him out of the way. They

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[15] See *The Independent Board Bulletin*, October 1942, published by The Independent Board for Presbyterian Foreign Missions, 151 Maplewood Avenue, Germantown, Philadelphia, Pa.; *The Missionary Review of the World*, published monthly by Missionary Rev. Pub'g Co., Inc., 156 Fifth Avenue, New York City, issue of December 1938 and issue of February 1939, pp. 71-73.

knew they could not find anything against him as to his work or honesty in his service to the government. They are reported as saying: "We shall not find any occasion against this Daniel except we find it against him concerning the law of his God." (Daniel 6:5) They framed a law (Psalm 94:20) which was contrary to the Law of Almighty God and all persons were commanded to comply therewith. Daniel refused and was caught in the conspiracy trap. He was thrown to the lions, but God delivered him because of his faithfulness to His covenant.

The compulsory flag-salute regulation is being used as a part of the totalitarian conspiracy for world domination to "get" Jehovah's witnesses in the same manner as Daniel was *framed*, while the great mass of the people are otherwise being regimented. It is manifestly foolish and silly legislation. The approximately seven years of endurance of persecution in the United States because of the regulation, and more than ten years' endurance of suffering for refusal to *heil Hitler* and his satellites and their respective "flags" in the *axis* dominated countries, should prove to all reasonable persons that the Law of Almighty God does not change, nor does the course of conduct of His servants acting according to the dictates of His commandments, and reminds all of the wise counsel given in the days of the apostles by the sage justice, Gamaliel, who, among other things said: "Refrain from these men, and let them alone; for if this counsel or this work be of men, it will come to nought: but if it be of God, ye cannot overthrow it; lest haply ye be found even to fight against God." —Acts 5:34-40.

[16] "George Washington, the almost universal character of whose wisdom always freshly surprises a century later wrote a letter to the descendants of those whom William Penn brought with him. In it General Washington said:

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[16] Clark, J., *Minersville Dist* v. *Gobitis* (CCA-3) 108 F. 2d 683.

'Government being, among other purposes, instituted to protect the persons and consciences of men from oppression it certainly is the duty of rulers, not only to abstain from it themselves, but according to their stations to prevent it in others.

'I assure you very explicitly, that in my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.'

—Writings of George Washington (Sparks Ed. Vol. 12, pp. 168-169), Letter to the Religious Society Called Quakers, October, 1789.

"The appellant School Board has failed to 'treat the conscientious scruples' of all children with that 'great delicacy and tenderness'. We agree with the father of our country that they should and we concur with the learned District Court in saying that they must." [16]

We submit that the statutes and regulation, *as construed and applied*, violate the constitutional rights of appellees; therefore the judgment of the trial court granting the permanent injunction should be affirmed.

Respectfully and confidently,

HAYDEN C. COVINGTON
117 Adams St., Brooklyn, N. Y.
Attorney for Appellees

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[16] Clark, J., *Minersville Dist.* v. *Gobitis* (CCA-3) 108 F. 2d 683.

APPENDIX A

CHILDREN'S KNOWLEDGE OF THE FLAG SALUTE

HERBERT T. OLANDER

Assistant Professor, University of Pittsburgh

[*Reprinted from the December, 1941 issue of the Journal of Educational Research*]

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[*Editor's note:* In these trying times, there is naturally and rightfully concern over our common welfare. The author presents data on the children's knowledge of the flag salute.]

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IN MANY schools every morning during the opening exercises children are required to indicate their devotion to their country by saying the Flag Salute. Day after day they continue to vow:

I pledge allegiance to the Flag of the United States of America and to the Republic for which it

stands; one nation, indivisible, with liberty and justice for all.

To what extent does this oral verbalization of the pledge result in the children's actually knowing and understanding the meaning of the Salute? The study here reported is an effort to present some facts bearing upon this question.

Teachers from thirteen schools systems, varying in size from rural districts to cities with populations ranging between twenty and thirty thousand, were requested to have their children from the third through the twelfth grade write the Flag Salute. To insure against coaching by teachers or possibilities that the pupils would especially prepare for this task, no warning of the forthcoming exercise was given. In order to test largely the influence of the oral verbalization of the Salute, rooms in which intensive work on the pledge, such as practice in writing it for written composition work, were not included in the study. The number excluded, however, was small, representing only some ten per cent of the rooms which were selected at random. In all, 2883 children wrote the pledge. Fifty-seven per cent of all the data was collected during the school year of 1939-40, forty-three per cent in 1940-41.

In the scoring of the papers, the chief criterion was the meaning revealed. Six types of errors were tabulated:

(1) "noncomprehensions" which included attempts to write words that had no plausible resemblance, phonetic or otherwise, to any English words,

(2) substitutions of words,

(3) omissions of words,

(4) transpositions of words,

(5) insertions of words,

(6) misspellings.

In the scoring, such mechanics as capitalization, punctuation, syllabication, abbreviation, crossing of t's, dotting of i's, and the child's handwriting were not considered.

Since a child's understanding of the significance of the pledge may or may not be correlated with his ability to write it, the pupils from certain representative rooms, approximating twenty per cent of the total, were asked not only to write the pledge but to state in their own words its meaning. In scoring the meanings, three ideas were considered basic to a fundamental grasp of the significance of the pledge: (1) our country is a land of liberty reflected in, for example, our free speech, trial by jury, free press, etc., (2) assurance of obedience, faithfulness, or obligation to the flag which symbolizes the United States of America, and (3) our country is an indivisible unit, made up of united people living in states which may not secede from the union. The maximum score for meaning was 3. Any idea expressed by a child which reasonably embraced one of the three basic concepts given above was given full credit. No partial scores were granted.

The number of children writing the pledge and the average number of errors in each grade are given in Table 1. As one might anticipate, the number of errors decreases fairly regularly with the increasingly higher grades. However, even in the twelfth grade an average of 3.5 errors was made, excluding many others such as capitalization or punctuation.

TABLE 1

NUMBER OF CHILDREN AND AVERAGE ERRORS FOR EACH GRADE

Grade	Number of Children	Average Errors
3	154	16.0
4	270	13.1
5	258	10.1
6	306	6.9
7	228	6.8
8	146	5.5
9	338	5.5
10	448	5.4
11	407	3.9
12	328	3.5
Total	2883	7.0

The average percentages of types of errors made by the pupils appears in Table 2. In Grade 12, for example, 59 per cent of the total number of errors made consisted of omissions of words, 20 per cent were substitutions, 16 per cent in misspellings, 3 per cent in insertions, 2 per cent in "non-

TABLE 2

PERCENTAGES OF TYPES OF ERRORS IN EACH GRADE

Grade	N	S	O	T	I	M	Total
3	25	6	57	0	7	5	= 100
4	17	13	47	0	0	23	= 100
5	13	16	44	0	5	22	= 100
6	11	20	39	1	4	25	= 100
7	7	19	54	1	3	16	= 100
8	2	17	53	1	2	25	= 100
9	3	17	62	0	6	12	= 100
10	3	17	64	0	4	12	= 100
11	1	16	63	1	4	15	= 100
12	2	20	59	0	3	16	= 100
Average	8.4	16.1	54.2	.4	3.8	17.1	= 100

comprehensions" (symbols which had no reasonable resemblance to any English word), and none in transpositions of words. It will be noted that most errors consisted of omissions. Next in order follow misspellings, substitutions, "noncomprehensions," insertions, and transpositions of words.

The general situation relative to the relationship between a pupil's ability to write the pledge and his explanation of its meaning may be observed in Table 3. Pupils

TABLE 3

AVERAGE NUMBER OF ERRORS ON PLEDGE IN RELATION TO EXPLANATION OF MEANING

Score on Meaning	Average Errors
0	11.4
1	7.7
2	4.4
3	2.1

receiving a score of 0 on their statements explaining the meaning of the pledge had an average of 11.4 errors on the papers containing the words of the pledge; those with a score of 1 averaged 7.7 errors; those with a score of 2 made 4.4 errors; and the ones with a meaning score of 3 averaged only 2.1 errors. Thus there seems to be a strong correlation between ability to write the words of the pledge and an understanding of its meaning. To be sure, since words are our best medium of thought, one might suspect that errors in words might reflect inadequacies or errors in thought. On the other hand, however, a child might be able to recite the words of the pledge perfectly and still have little conception of its meaning. Notwithstanding this latter possibility, the intelligence of the children no doubt is a factor which operates in relation to success both in writing the words and stating the meaning of the pledge.

Below, taken from each grade, is included a sample which is fairly typical of the attempts of the children of a given grade to write the words of the Salute to the Flag as a result of the daily oral verbalization of the pledge. Since the data in Table 2 represent averages of types of errors and not the situation with respect to the individual performances of children, few, if any of the children's papers reflect the particular patterns revealed in the table. This situation is of course one of the familiar limitations of all statistical averages.

GRADE 3

I ploge L. to the flag of U. S. of A. and the p e for wisk It Sand

GRADE 4

I Pleglint to the Flay, of United States of America, and to the land one Naniton Indesvoil with Lirbty and justes for all.

GRADE 5

I pleg the leggens to the flag of the United States of America. To which it stands one nation inavibl for liberty justest for all.

GRADE 6

I plede allengone to the flag of United States of America and to the repulic for which it stands one nation invisble with liberty for all.

GRADE 7

I pledge alligence to the flag of the U. S. of America and to the republic for which it stands one nation indivial with

GRADE 8

I plegde allignace to the flag of United States of America and to the republic to which it stands one nation indivisable, liberty and justice for all.

GRADE 9

I pledge alagances to the flag of the United States of America and to the Republic for which it stands one nation invisable with liberty and ju

GRADE 10

I pledge alliegence to the flay of the United States of America and to whom it stands. One nation indivisible with liberty and justice for all.

GRADE 11

I pledge aliegence to the flag of the U. S. of America and to the Republic for which it stand. One nation indivisible and justice for all.

GRADE 12

I pledge alligence to the flag of the United States and to the liberty for which it stands. One nation indivisible, with liberty and justice for all.

The following represent samples which have been graded 0, 1, 2, and 3 respectively on meaning according to the method of scoring already described.

SCORE 3

That I owe my life to my country. That I would do *anything* for my country. That the United States should be honored. That the United States is not able to be separated. That we have justice (fair trials) and liberty (are free).

SCORE 2

The flag Salute means that we are thankful for our flage, and are ready to serve our country. One nation in the visible means our nation. And we want Liberty and Justice for all United States of America.

SCORE 1

It means Saluting to the flag and promosing you will be loyal and true to your country.

SCORE 0

The Flag and Flag Salute makes me think of my forefathers who fought for our country. It makes me so proud to live under the Red, White and Blue, I hardly know what to do. The Flag makes me feel safe from war-torn Europe. In my eyes the Flag of our Country is "The Gem of the Ocean," long may it (way) wave. I'll feel safe as long as Old Glory is floating in the breeze.

To give the reader some impression as to what the Flag may mean to a few pupils who each morning are requested merely to repeat orally the pledge, some interesting illustrations are included.

I pledge a legend to the United States of America—one nation in the vestibule and that's all".

I plege alegance to the American flag of United State America—for liberty and justice in God.

I pledge alligence to this flag of the United States and to the liberity for which it stands. To this nation indespensible.

The Flag is passing by.

I wear allegience to the flag, of the United States of America, and to the Bepublic, for which it stands—

I pledge Allegiance to the flag, of the United States of America, and to one individual for which it stands

I pledge the legion to the flag, of United States of America and to the Republican for which it stands, one nation individual with liberty and justices for all.

I pledge my allegance, to the flag—one nation, indivincibl. with liberty and death for all.

The data in this study reveal a rather pathetic picture of our attempts to teach children not only the words but the meaning of our Flag Salute which especially today should carry such significant import for the youth of our land.

Though the data of this study are limited to school rooms in which little or no attempt had been centered on having

children write and grasp the meaning of the Salute to the Flag, among the schools approached for cooperation in this study, comparatively few of them had given any intensive consideration to teaching the exact words and meaning of the pledge. The findings however did reveal that during the present school year, no doubt as a result of the war situation, progressively more schools were teaching the pledge beyond the practice of having the children merely mouth the words in a routine manner once each day.

It is obvious that some effective methods for teaching the Flag Salute must be tried by schools. Some suggestive ones come to mind: discussion of the meaning and implications of, as well as the reasons for, giving the pledge; and the use of motion pictures, slides, or other media for the purpose of giving pupils concrete associations with the abstract symbols constituting the pledge. Apparently the method of having children merely repeat orally the vow of allegiance to their country has decided limitations.

APPENDIX B

[See pages 81-84, supra]

Brooklyn, New York, June 10, 1940

National Commander Raymond J. Kelly
American Legion
Indianapolis, Indiana

Dear Sir:

Advance reprint pages of the June issue of the *National Legionnaire* have been called to my attention. I fully concur with you that subversive activities should be suppressed by lawful means.

I am aware of the fact that fanatics often take advantage of a laudable organization and resort to unlawful means. During the past week such fanatics in Texas and Maine and in other places have acted as though they were authorized by the American Legion to inflict punishment upon innocent persons. You have doubtless seen many reports of this in the press. I call your attention to a few:

At Odessa, Texas, a number of Christian people otherwise known as Jehovah's witnesses were distributing *The Watchtower*, a publication which for more than 60 years has been devoted exclusively to the explanation of Bible truths. A mob, claiming to be acting at the instance of the American Legion, fell upon this company of Christian people, ill-used them, had

[APPENDIX B *continued*]

them put in jail and held there more than 24 hours in a crowded room without any accommodations and without food and water, and then taken out and driven down a railroad track in the broiling hot sun not permitting them to stop to get water or other refreshment; and this continued until many of them fainted. To this cruel and unusual punishment can be found no parallel anywhere outside of Germany.

At another place, near Houston, Texas, a Catholic priest led a mob that committed similar assaults upon Jehovah's witnesses, seized their literature and phonographs and destroyed them.

In Kennebunk, Maine, the mob under the same pretext assaulted the building in which several law-abiding citizens known as Jehovah's witnesses resided, broke the windows and broke in the doors and later burned the building to the ground.

These are just a few of like instances that have occurred in the last few days in many of the states.

I beg to call your attention to the fact that the real offenders against the government and against the people are the Nazi agents who are trying to camouflage their own action and to hide the fact that they are the fifth column by wrongfully charging innocent people with being subversive and doing so in the name of the American Legion. I am certain that the American Legion would not endorse any such action. Some of your officers have published in the press in the South statements denouncing such mob action. I am sure you could do much to quell this unlawful action against innocent American citizens by calling attention to the fact in your paper and advising the officers of your organization to attempt to quiet such fanatical persons. I mention this in the interest of good government and righteousness.

I am certain that your organization in nowise endorses mob violence. If anyone has committed an unlawful act, then he should be proceeded against in a lawful manner. Will you please use your influence to suppress a fanatical element that acts in the name of the Legion in committing wrongful acts?

Without a question of a doubt the Nazis have many agents and representatives in America. They are attempting to destroy the nation. These are the ones that should be sought out and dealt with in a lawful manner, but in such an emphatic way that Nazism may not be permitted to overrun this nation as it has many of the nations of Europe.

I should be very glad to have your reply that you in nowise endorse mob action and that you will advise all persons acting in the name of the American Legion to refrain from mob action against all persons who are pursuing a lawful course and who are clearly within their constitutional rights.

Very sincerely yours,

WATCH TOWER BIBLE AND TRACT SOCIETY

J. F. Rutherford, President